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Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-422

E. C. DOTHARD, ET AL.,
APPELLANT

VERSUS

BRENDA M. MIETH, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

THE OPINION BELOW

The opinion of the United States District Court for the Middle District of Alabama (Appendix A and B, infra, pp. 14 - 51) is not yet reported.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is an appeal from an order of a three judge district court enjoining the enforcement of both a state statute and an administrative regulation. Appellants are officials of the

State of Alabama who are charged with the enforcement of the state statute and regulations in question. Appellees are representatives of a class of women who are, or might be employed as state troopers and/or prison guards. This appeal affects only the class seeking employment as prison guards. The statute in question is Code of Alabama, Title 55, § 373(109), (1940) (Recomp. 1958) which establishes the minimum standards for law enforcement officers. Paragraphs (d) of that subsection defines minimum height and weight qualifications as follows:

> "(d) Physical qualifications. — The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good causes shown permit variances from the physical qualifications prescribed in this subdivision." (See Appendix C, infra, for full text of act, pp. 52 - 54).

The court below found such qualifications to be sexually discriminatory toward the class of individuals represented by appellee Dianne K. Rawlinson. Pursuant to this finding the court enjoined further enforcement of the height and weight requirements in the Alabama statute.

In addition to the above basis sustaining the three-judge court's jurisdiction, a state administrative regulation was also enjoined from further application. The Alabama Board of Corrections, who are appellants herein, were permanently enjoined from further enforcement of the Board's Administrative Regulation Number 204. (Appendix D, Infra, pp. 55 - 63). That regulation, being based on the advisory opinions of the Federal Equal Employment Opportunity Commission, provides for the determination and designation of bona fide occupational qualifications regarding sex in the field of correctional officers. The court below found such regulation to be sexually discriminatory and unsubstantiated by any bona fide occupational qualification. It was therefore stricken from further application.

This action was brought by appellees under Title 42 U.S.C., § 1983 and Title 42 U.S.C., § 2000e-2. Jurisdiction for the court below was therefore provided by Title 28 U.S.C., § § 1331, 1343(3) and Title 42 U.S.C., § 2000e-5(f).

Due to the fact that the complaint challenged a state statute and an administrative regulation on constitutional grounds, and sought injunctive relief against state officials, a three-judge court was convened pursuant to Title 28 U.S.C., § 2281. The injunction sought was issued by order of the court on June 28, 1976 with Notice of Appeal to this court being given on July 23, 1976. (See Appendix E, infra, pp. 64 - 66). Application for rehearing was not made in this case. Jurisdiction of this direct appeal is conferred on this Court by Title 28 U.S.C., § 1253.

Cases sustaining this Court's jurisdiction are:

Florida Lime and Avocado Growers, Inc. v. Jacobsen,
362 U.S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960)

Lynch v. Household Finance Corp,
405 U.S. 538, 92 S. Ct. 113, 31 L. Ed. 2d 424 (1972)

QUESTIONS PRESENTED BY THE APPEAL

I. Are equal employment opportunities under Title 42 U.S.C., § 2000e-2 and the fourteenth amendment unconstitutionally restricted on the basis of sex by a height and weight requirement for employment as a prison guard under a state statute?

II. Whether a prima facie case of sex discrimination is established under Title 42 U.S.C., § 2000e-2 by a showing by a class representative that fourteen year old census figures indicate that a height and weight requirement in a state statute may be more restrictive to women in general than to men with no indication of the impact on job applicants?

III. Whether the selective certification for employment of prison guards on the basis of sex to be employed at either male or female prisons pursuant to a state administrative regulation which establishes set criteria, is constitutionally permissible on the basis of a bona fide occupational qualification?

STATEMENT OF THE FACTS OF THE CASE

Plaintiffs in this case purport to be representatives of a class of females who are, or might be, employed as Alabama State Troopers, and the class of women who are, or might be employed as prison guards with the Alabama Board of Corrections. The class also purports to cover all applicants for either position. This appeal is taken only by those defendants affected by the lower court's ruling pertaining to the hiring and assignment of prison guards. Dianne K. Rawlinson is the plaintiff representative of the class affected by that portion of the court's order. For these reasons, only

the facts and rulings involving the employment of prison guards and their work assignments will be discussed here.

Appellants are the individual members of the Alabama Board of Corrections and the Commissioner of Corrections for Alabama. Ms. Rawlinson, the appellee here affected, is a 22-year-old white female college graduate. She is five feet three inches tall and weighs one hundred and fifteen pounds.

In September, 1974, Ms. Rawlinson applied with the Alabama Personnel Board for the position of Correctional Counselor Trainee, or what is commonly termed a prison guard. Her application was rejected because she did not meet the statutory weight minimums. Under Title 55, § 373 (109), Code of Alabama (1940) (Recomp. 1958), law enforcement officers are required to meet several criteria for employment which include a minimum height of five feet two inches and a minimum weight of one hundred twenty pounds. Since Ms. Rawlinson weighed only one hundred and fifteen pounds, her application was rejected. The statute provides for possible variances of these requirements by the State Minimum Standard and Training Commission for good cause shown, however, Ms. Rawlinson never requested such a waiver.

Following Ms. Rawlinson's rejection by the State Personnel Board, she filed a complaint with the Equal Employment Opportunity Commission in November, 1974. She received her "right to sue" letter on January 15, 1976. The complaint in this case was filed December 8, 1975. The claims of Ms. Rawlinson contested the validity of the State statutory height and weight restriction under Title 42 U.S.C., § 2000e-2 as being sexually discriminatory. Her claim also contests the validity of the Board of Corrections Administra-

tive Regulation No. 204. That regulation was promulgated by Appellants to allow selective certification from the state personnel roles for jobs to be filed only by persons of a designated sex. The designation of these particular jobs is made on the basis of criteria set out by the Regulation itself. Basically, the Regulation was a method of identifying jobs within the prison system where a given sex would be a bona fide occupational qualification. Ms. Rawlinson attacked this regulation under Title 42 U.S.C., § 2000e - 2, even though the facts below show she was not on the personnel roles affected thereby.

The case was submitted to a three-judge district court in the Middle District of Alabama. The defendants requested a hearing in open court, however this was denied and the case was considered upon depositions and briefs. The opinion of the court below, filed on June 28, 1976, enjoined appellants from further enforcement of the height and weight requirements under Code of Alabama, Title 55, § 373(109)(d) as well as from any further enforcement of Administrative Regulation 204. Notice of appeal was given to this Court by appellants herein on July 23, 1976.

The court ruled below that the state minimum height and weight requirements for law enforcement officers was sexually discriminatory. The state statute was struck down in this regard dispite the fact that no mention of a particular sex as a qualification is made in the statute. The sole basis for the court's action was that statistics taken in 1960-1962 indicate that more women than men would not meet these qualifications and would therefore suffer a disproportionate impact. From this finding the court concluded a prima facie case of discrimination was established and posed

the burden upon appellants to uphold the state statute's requirements by requiring a showing that these were bona fide occupational qualifications — even though box sexes were excluded by the requirements. The court below never concluded how many applicants for the job were women nor how many women applicants were denied the job. The court's findings were based on fourteen to sixteen year old census figures which were in no way connected with application for employment under the statute in question.

Even though such a task should not have been imposed on appellants, they offered proof of the reasonableness of these legislative standards. Each side offered expert testimony via deposition. It was, and is, the position of appellants that the sex-blind height/weight requirement of the Alabama statute is justified by the physical nature of the job of a law enforcement officer. The strength, leverage and physical abilities commonly commensurate with increased height and weight were posed below as reasons for the requirement. Although quiet obviously the the varied tasks of a law enforcement officer as well as subjective abilities of given individuals may negate, in some instances, the necessity for these particular requirements, the objective criteria established by the Alabama legislature were urged as justified by the need for assurance of the physical protection of both society and the officer. The court below found otherwise, striking down the Alabama statute.

In addition to state statute, plaintiff also challenged Administrative Regulation 204. The Board of Corrections promulgated that regulation following extensive research and study including advice from the General Counsel of the Equal Employment Opportunity Commission. The regulation provides criteria fr the determination of jobs within the Ala-

bama prison system where a given sex would be a bona fide occupational qualification. (See Appendix D, infra, pp. 55-63). This regulation was felt warranted by the nature of the penal institutions in Alabama. By far the largest amount of correctional officers in the Alabama system are employed at the four major all male institutions. These institutions are maximum security prisons which utilize dormitory housing rather than single cell accomodations. The showers and toilet facilities are communal and are open to the hallways. Furthermore, extensive farm operations are carried on at these institutions which require strip searches of the inmates for security reasons. Moreover, due to the type of inmates housed at these institutions, security is both the most crucial and the most difficult to maintain. These conditions considered, which require a maximum of guard-inmate contact in nearly indefensible positions for a vulnerable guard, the Board of Corrections established Regulation 204. Recognizing the already tense situation in these institutions, the Board through this regulation allows for the determination of positions in which a female guard would be more detrimental than beneficial. These situations are defined by criteria within the regulation which recognize the inherent sex drives of the individuals involved, the excitement caused thereby, the need for security of the institutions, the right of privacy of the inmates and the additional attention and commensurate disruption that would be shown toward a female guard in an all male environment possessing no heterosexual outlets.

The court below found the Regulation to unjustified and enjoined its further application. In its opinion the court reasoned that the Board's basis for the regulation was not consistent with its actions since women were, in fact, employed in "contact" positions at work release centers. The

court makes no attempt to differentiate between the functions of a correctional officer at a minimum security work release center where the inmates hold outside jobs and, the officers function at a maximum security prison where the inmates are totally confined due to their propensities for violence and/or escape. The only concession made by the court to the Board's practical concerns was that the inmate's right to privacy should be preserved by "selective work responsibilities among correctional officers rather than by selective job classifications." No hint is given how this could be accomplished consistent with Title VII if not through a regulation just such as the one stricken down.

Following the issuance of its opinion the court below also taxed the costs including substantial attorney's fees against the defendants. Appellants here appeal the lower court's findings and judgment pursuant to Title 28 U.S.C., § 1253.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I. A substantial federal question is involved because a three-judge district court has held to be unconstitutional a state statute and a state administrative regulation. Both the statute and regulation were stricken on the basis of findings of sex discrimination against women under Title 42 U.S.C., § 2000e-2. The state statute provision involved only a height and weight requirement for employment as a law-enforcement officer, yet this was found to be sexually discriminatory by the court below. This court has not spoken to the use of such sexless physical requirements as job requisites in light of a Title VII claim of sex discrimination. Furthermore, the only Circuit Court of Appeals decision found involving this issue is in conflict with the opinion of the

court below in the present case. *See Smith v. Troyan*, 520 F. 2d 492 (6th Cir. 1975). The importance of the issue is further accented by the findings in *Smith, supra,* which show the widespread national use of height and weight requirements for employment in law enforcement positions.

II. The plaintiff did not establish a prima facie case of sex discrimination required by Title 42 U.S.C., § 2000e-2. This Court's prior decisions, and those of lower Federal Courts, clearly show that a prima facie case of discrimination in hiring procedure must be made before a defendant will be required to justify a statute, regulation or other means of implementing hiring practices. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court makes reference to this burden, and recites the rule involved. The Court stated that a prima facie case should be shown by establishing that the procedure used in hiring, selected persons in racial patterns significantly different from that of the pool of applicants. 422 U.S. at 425. The fact that a plaintiff might show a lesser representation by one class than another should not be considered as establishing a prima facie case. If a gender-related classification such as in *Geduldig v. Aiello*, 417 U.S. 484 (1974) fails to show sex discrimination it would not warrant a prima facie determination as in the present case. This is especially true since the Federal District Court did not even determine the number of women who made application for the position of prison guard. At the very least, the plaintiff should have shown, or the court should have determined that hiring was done in a sex pattern significantly different from that of the pool of applicants. However, the court made no findings regarding the applications submitted, but merely deduced that a prima facie case had been shown since fewer women than men could satisfy the requirements of height and weight.

The District Court made this determination even though height and requirements are supported by case law, and even though the Alabama Statute is much less restrictive than similar state legislation. *Smith v. Troyan*, 520 2d 492 (6th Cir. 1975). The Alabama statute requires that a correctional counselor be 5'2" in height and weight 120 pounds. In view of the numerous height and weight requirements for law enforcement officials in the majority of the states, the District Court should have concluded that the less restrictive Alabama Statute has a manifest relationship with work performance.

III. The standards invoked by both Title 55 Section 373 (109), Code of Alabama 1940 (Recomp. 1958) and Regulation 204 were promulgated and serve as a bona fide occupational qualification.

Administrative Regulation 204 provides criteria for the determination of jobs within the Alabama Prison System, where a given sex would be a bona fide occupational qualification. This regulation was felt warranted by the nature of the penal institutions in Alabama. The Regulation was struck down pursuant to the complaint of Ms. Rawlinson even though she had not been assigned duty under the regulations, and would not stand in the same position with those persons currently functioning under its provisions.

Regulation 204 is needed in Alabama because of the nature of the penal institutions in Alabama. By far the largest amount of correctional officers in the Alabama System are employed at the four major all male maximum security institutions. These maximum security institutions utilize dormitory housing rather than single cell accommodations. The showers and toilet facilities are communial and

are open to the hallways. Furthermore, extensive farm operations are carried on at these institutions which require strip searches of the inmates for security reasons. Moreover, due to the type of inmates housed at these institutions security is both the most critical and the most difficult to maintain. A maximum guard-inmate contact is required and creates a nearly indefensible position for a vulnerable guard. Many of the inmates are maximum security sex offenders. The Board through Regulations 204 allows for the determination of positions in which a female guard would be more detrimental than beneficial. Under these circumstances the District Court enjoined the enforcement of Regulation 204.

In its opinion the court found that the regulation was not consistent with Board positions since women were in fact employed in contact positions at work release centers. The court makes no attempt to differentiate between the functions of a correctional officer, or danger to such officers when supervising minimum security inmates of proven adaptation to society, and those of proven vicious propensities. The court's only concession to the Board's practical concern was that the Department of Corrections could use selective work responsibilities among correctional officers. However, no hint is given as to how this could be accomplished consistent with Title VII if not through a regulation just such as 204. We submit that the facts show that the Regulation is job related, and that the plaintiff has not shown that other work regulations would serve the employer's legitimate interest more efficiently. *Albermarle Paper Co. v Moody*, 422 U.S. 405 (1975).

CONCLUSION

For the reasons stated above, appellants submit that the questions presented in this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted so as to allow plenary consideration of the issues, with brief on the merits and oral argument to aid in their resolution.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRENDA M MIETH and DIANNE K. RAWLINSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

E. C. DOTHARD, individually and in his official capacity as Director of the Department of Public Safety, his agents, servants, assigns, and successors in office; ALABAMA BOARD OF CORRECTIONS; THOMAS F. STATON; REV. J. VICKERS; R. H. ROBINSON; MARION CARROLL, JR., and C. E. CARMICHAEL, JR., individually and in their official capacities as members of the Alabama Board of Corrections, their agents, servants, assigns, and successors in office; JUDSON LOCKE, individually and in his official capacity as Alabama Commissioner of Corrections, his agents, servants, assigns and successors in office; STANLEY FRAZER, individually

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and in his official capacity as Director of the Alabama Personnel Board, his agents, servants, assigns, and successors in office; ALABAMA PERSONNEL BOARD; RALPH ADAMS; D. KYSER WILSON, and C. W. ANDERSON, individually and in their official capacities as members of the Alabama Personnel Board, their agents, servants, assigns, and successors in office; ALABAMA PEACE OFFICERS STANDARDS AND TRAINING COMMISSION; WALKER HOBBIE; E. L. WRIGHT, JR.; ERNEST KENTRELL; A. E. COOPER; RICHARD HEARN; TAYLOR WILKINS; and JAMES JACKSON, individually and in their official capacities as members of the Alabama Peace Officers Standards and Training Commission, their agents, servants, assigns, and successors in office,

Defendants.

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges.

PER CURIAM:

STATEMENT OF THE CASE

This class action is brought by two women whose applications for employment with the Department of Public Safety and the Board of Corrections of the State of Alabama were denied on account of their failure to meet minimum weight and height requirements. Plaintiffs contend that these height and weight requirements and the assignment policies of the Board of Corrections are sexually discriminatory, and they seek to bring this lawsuit on their own behalf and on behalf of all women who might be employed or are applicants for employment as state law enforcement officers as that term is defined by Alabama Code, Title 55 § 373(109) (1973 Supp.)[1] Alternatively, plaintiffs seek to represent all women who might be employed or are applicants for employment with the Department of Public Safety for the position of State Trooper and all women who are employed, might be employed, or are applicants for employment with the Board of Corrections for the position of Correctional Counselor, Correctional Counselor Trainee, or Correctional Officer. Under the first definition of plaintiffs' class, jobs in law enforcement agencies other than the Department of Public Safety and the Board of Corrections would be affected. Evidence submitted to this Court, however, has involved only the positions of Correctional Counselor with the Board of Corrections and State Trooper with the Department of Public Safety. Because the merits of this sex discrimination claim turn significantly upon the nature of the employment duties, this Court rejects the broad definition submitted by the plaintiffs and certifies the alternative, more narrow, one.

[1] This section reads: "Law-enforcement officer" means and includes a policeman, deputy sheriff, deputy constable, and other official who has authority as such official make arrests. It includes Alabama state troopers or members of the state department of public safety, and the Alabama board of corrections.

Defendants in this case are E. C. Dothard, Director of the Department of Public Safety; the Alabama Board of Corrections and its individual members; Judson Locke, Commissioner of the Board of Corrections; Stanley Frazer, Director of the Alabama Personnel Board; the Alabama Personnel Board and its individual members; and the Alabama Peace Officers' Standards and Training Commission and its individual members.

Plaintiffs' claims arise under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2. The amount in controversy exceeds $10,000 exclusive of interests and costs. Jurisdiction is provided by 28 U.S.C. §§ 1331, 1343(3) and 42 U.S.C. § 2000e-5(f). Because a statute and administrative orders of the State of Alabama are challenged on constitutional grounds, and injunctive relief is sought against state officials, a three-judge court has been convened pursuant to 28 U.S.C. § 2281. The submission of this case is upon the briefs and the evidence presented by the depositions, interrogatories and other documents of the parties.

FINDINGS OF FACT

A. State Troopers

The Department of Public Safety of the State of Alabama was created by the legislature primarily to enforce the state's traffic laws. See Alabama Code, Title 36 § 58(58) (1958). The Department is divided into divisions which include the following: (1) administrative division, (2) highway patrol division, (3) driver's license division, and (4) service division. Id. § 58(56). A director, appointed by the Governor, serves at the pleasure of the Governor as head

of the department. **Id.**, § 58(54). It is the duty of the director to appoint all employees of the department, subject to the rules of Alabama's merit system law. **Id.**, § 58(57). The merit system announcement for the position of State Trooper (formerly the highway patrol division) requires the following qualifications:

> (1) Graduation from a standard senior high school or GED certificate.
>
> (2) Possession, upon appointment, of a valid Alabama driver's license.
>
> (3) Passage of a physical examination equivalent to that established by the United States Army.
>
> (4) Measure at least 5 feet, 9 inches in height without shoes and weigh at least 160 pounds without clothing.
>
> (5) Sound teeth and vision correctible to 20/20, free from color blindness.
>
> (6) Be between the ages of 21 and 36 years.
>
> (7) Must never have been convicted of a felony or a misdemeanor involving either force, violence, moral turpitude or serious traffic violations.

Height and weight limitations have been a longstanding requirement for the job of State Trooper. While this requirement is an administrative one, the Director of the Department of Public Safety has testified that he is unsure as to how the requirements were developed or why these particular heights and weights were chosen. No study or test has ever been conducted by the department to determine what specific skills required of a State Trooper can be performed only by a 5'9", 160 pound person. Applicants who meet these physical qualifications are given a written exam and then placed on a register according to their exam grade. Appointment to the position of State Trooper is made from the top three names on this register.

The job of a State Trooper is described in the merit system announcement as follows:

> A State Trooper enforces state laws and regulations, especially traffic laws. He patrols an assigned area in a patrol car; uses two-way telephone equipment; gives assistance to motorists; stops trucks to determine compliance with state and federal regulations; directs traffic, investigates accidents, gives first aid and safeguards property; investigates crimes or complaints, makes reports of findings; arrests law violators; appears in court as a witness; assists other law enforcement agencies; gives directions to tourists; watches for and corrects or reports hazards to safe driving. He may administer drivers' license examinations or do other police work as required.

The director of the department estimates that 75 to 90 percent of the time of the State Trooper is taken up with traffic enforcement. Much of this time is spent alone, patrolling the rural highways of Alabama without the availability of back-up. Unquestionably, the job is hazardous. Because of these hazards, the director has testified that he believes that physical strength is very important in relation to the performance of the job. Specific incidents where strength would come into play would be arresting an uncooperative individual, rescuing a person pinned underneath a car, or removing heavy objects obstructing the highway. No test for

physical strength is given, however, in the State Trooper selection process. The Department does not actively recruit women for the position of State Trooper in spite of the fact that the director feels that, although women should not be assigned to the rural highways, they could serve as drivers' license examiners, investigators and safety instructors. In the present force of 659 State Troopers. there are no women employed. To the best knowledge of the director, only four women are presently on the list of 1,627 names in the register to become State Troopers.

Brenda Mieth is a 28-year-old female who is 5'6" in height and 132-133 pounds in weight. Ms. Mieth is a graduate of high school and the Monroe Business College and from 1973 to the present has been taking courses dealing with law enforcement at Troy State University and Prince George's Community College in Maryland. On October 23, 1975, Ms. Mieth made application to the Alabama Personnel Board for employment by the Department of Public Safety in the position of State Trooper. The Personnel Board, on October 30, 1975, mailed Ms. Mieth a notice that her application was unacceptable for failure to meet the minimum weight requirements. Apparently, Ms. Mieth meets all other job prerequisites except the height limitation which was not mentioned in the notice.

After learning of her rejection, Ms. Mieth obtained a personal interview with Colonel E. C. Dothard, the Director of the Department of Public Safety of the State of Alabama, and requested a waiver of the height and weight restrictions, citing her strong desire to be a State Trooper. Colonel Dothard refused this request, informing Ms. Mieth that he would never put a woman on the road because of the dangers

involved. Before departing, the director, in a courtly gesture, presented Ms. Mieth with a certificate making her an "Honorary State Trooper."

Sinice the rejection of her application for employment by the Alabama Department of Public Safety, Ms. Mieth has sought in vain to secure employment with several law enforcement agencies in Alabama, Virginia and Maryland. She is presently employed in a security position by a privavte business firm at the rate of $3.00 per hour.

B. Correctional Counselors

The Board of Corrections of Alabama is vested with the authority of administering the state's correctional system. Alabama Code, Title 45 § 10(1) (1958). The board is composed of five members who must be residents and are qualified electors of the State of Alabama. Board members are appointed by the Governor with the advice and consent of the Senate for ten year terms. **Id.**, § 10(2). The board has the power to appoint all employees that are required for the performance of its duties, **id.**, § 10(4), and is required to appoint a commissioner who serves at the pleasure of the board. **Id.**, § 10(5). The commissioner is authorized to receive delegations of authority from the board and is given the power to appoint, with the approval of the board, two deputy commissioners. **Id.** All employees of the board, with the exception of the commissioner and deputy commissioners, are subject to Alabama's merit system of employment. **Id.**, § 10(4).

The board currently operates four major all-male penitentiaries—Holman Prison, Kilby Corrections Facility, G. K. Fountain Correction Center, and Draper Correctional Center.

Additionally, the Board maintains Julia Tutwiler Prison for Women, the Frank Lee Youth Center, the #4 Honor Camp, the State Cattle Ranch, and nine Work Release Centers, one of which is for women. The four all-male penitentiaries and Julia Tutwiler are designed as maximum security institutions to house maximum security prisoners. Facilities at these institutions are predominantly dormitories with Communal showers and toilets which are open to the dormitories and hallways of the facility. An extensive farming operation is carried on at both Draper and Fountain outside the prison walls. This necessitates a large number of strip searches for contraband when prisoners re-enter the confines of the institution.

Conditions in Alabama's all-male penitentiaries have been found by a federal district court to constitute cruel and unusual punishment as they are "so bad as to be shocking to the conscience of reasonably civilized people."[2] Among the ills of the prisons are overcrowding, understaffing, unsanitary living conditions, lack of recreational and rehabilitative programs, and lack of inmate security. In view of this, the Court stated that "the rampant violence and jungle atmosphere existing throughout Alabama's penal institutions are no surprise."[3] The board has been enjoined by the Court from failing to implement fully minimum standards specified by a court order. Among other things, the board must drastically increase the numbers of the custodial staff at each institution and must institute an affirmative hiring program designed to reduce and having the effect of reducing

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[2] **James** v. **Wallace,** 406 F. Supp. 318, 329 (M.D. Ala. 1976), quoting **Holt** v. **Sarver,** 309 F. Supp. 362, 372-373 (E.D. Ark. 1970), **aff'd** 442 F.2d 304 (8th Cir. 1971).

[3] **James** v. **Wallace,** 406 F. Supp. 318, 325 (M.D. Ala. 1976).

the racial and cultural disparity between the staff and the inmate population.

One of the various merit system positions in the Alabama Correction System is that of correctional counselor.[4] The entry level position for correctional counselor is that of correctional counselor trainee. The job description of a correctional counselor I is as follows:

> Patrols prisons and prison yards; stands watch in halls, at gates, or in wall towers; makes regular reports to supervisors.
>
> Supervises and keeps order among prisoners assigned to work in prison kitchens, shops, mills, laundries, or on farms.
>
> Enforces regulations covering sanitation and personal care.
>
> Inspects all traffic into and out of prison proper. Maintains constant watch for and reports unusual conditions or disturbances; keeps firearms in readiness for use if necessary; takes required action in emergencies to prevent escapes or suppress disorder; assists in recapture of escaped prisoners.
>
> Explains to inmates rules, procedures and services available at correctional institutions; counsels individual inmates regarding personal problems, educa-

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[4] This position replaces the former correctional officer position. Under a grandfathering provision, employees hired as correctional officers are still designated as such. For purposes of this opinion the terms "correctional counselor" and "correctional officer" will be used interchangeably.

tional and vocational opportunities and work assignments.

Evaluates inmate behavior and adjustment to a correctional environment; submits evaluation reports. Instructs inmates in personal hygiene, discipline and proper etiquette.

Performs related work as required.

As the above job description indicates, correctional counselors are persons who are commonly referred to as prison guards. Their duties primarily involve security rather than counseling.

To apply for this position, applicants must possess a valid Alabama driver's license, be a high school graduate or GED equivalent, be free from physical defects, be between the ages of 20 ½ years and 45 years at the time of appointment, and fall between the minimum height and weight requirements of 5' 2", 120 pounds and the maximum of 6' 10" and 300 pounds. There is no written examination for the position of correctional counselor trainee; the grade assigned each applicant is based on experience and education. Employment is competitive. When a position opens, the Board of Corrections makes a request to the State Personnel Office for three names from the register. If more than one position is being filled, one name is submitted for each additional position.

The selection process described above is qualified by one exception, Administrative Regulation Number 204, which allows for selective certification for appointment of either male or female employees from the State Personnel Department's registers. Institutional wardens and directors identify each institutional correctional counselor I position which they find

requires selective classification. The following criteria are used to establish that selective certification is necessary:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patrolling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries has been implemented. Women correctional counselors are not, however, precluded from serving in contact positions in the all-male institutions other than the penitentiaries. Contact positions are those which require personal interaction with inmates. A dormitory patrol would be a contact position whereas a guard tower surveillance would not.

The following charts submitted in the brief for defendant Judson Locke, the Commissioner of the Board of Corrections, give a breakdown by sex of the total correctional counselor/correctional officer/correctional counselor trainee force at each institution:

Name of Institution	Male	Female	Total	%Male	%Female
Alexander City Work Release	7	0	7	100	0.
Atmore Work Release	4	1	5	80.0	20.0
Birmingham, Work Release	5	2	7	71.5	28.5
Childersburg Work Release	5	2	7	71.5	28.5
Draper Correctional Center	83	3	86	96.5	3.5
G. K. Fountain Correctional Center	89	5	94	94.7	5.3
Holman Prison	84	3	87	96.6	3.4
Kilby Correctional Center	67	2	69	97.0	3.0
Mobile Work Release	5	2	7	71.5	28.5
Frank Lee Youth Center	7	3	10	70.0	30.0
Montgomery Work Release	5	5	10	50.0	50.0
Number 4 Honor Camp	10	0	10	100	0
Tutwiler	5	21	26	19.2	80.8
Wetumpka Work Release	0	4	4	0	100
Youth Development Officers at Frank Lee Youth Center	3	3	6	50.0	50.0
	379	56	435	87.1	12.9

The total correctional counselor/correctional officer/correctional counselor trainee force in contact positions at the non-penitentiaries in the Alabama Prison System by sex is as follows:[5]

[5] There are some slight discrepancies between the figures stated in the plaintiffs' and defendants' briefs. The exact breakdown is difficult to determine, apparently due to the board's record keeping problems. The Court notes one obvious error in the computer printout of employees supplied by the defendants in their answer to Plaintiffs' Interrogatory Number 4, filed April 8, 1976. Barbara Ruffin, a correctional counselor I at the Mobile Work Release Center, is listed as a male. For purposes of this decision, however, this Court will accept the figures stated in the Board of Corrections' brief filed May 3, 1976, as we are convinced that the errors contained therein are de minimis.

Name of Institution	Male	Female	Total	%Male	%Female
Alexander City Work Release	7	0	7	100	0
Atmore Work Release	4	1	5	80.0	70.0
Birminghaam Work Release	5	2	7	71.5	28.5
Childersburg Work Release	5	2	7	71.5	28.5
Frank Lee Youth Center	7	3	10	70.0	30.0
Mobile Work Release	5	2	7	71.5	28.5
Montgomery Work Release	5	5	10	50.0	50.0
Number 4 Honor Camp	10	0	10	100	0
Wetumpka Work Release	0	4	4	0	100
Youth Development Officers at Frank Lee Youth Center	3	3	6	50.0	50.0
	51	22	73	69.9	30.1

Plaintiff Dianne K. Rawlinson is a 22-year-old female whose present height and weight are 5'3" and 115 pounds. Ms. Rawlinson possesses a valid Alabama Driver's license and she has no physical defects that would prevent her from functioning as a law enforcement officer. The educational credentials of Ms. Rawlinson are impressive and ideally suited for a career in corrections. After graduating from high school in 1971, Ms. Rawlinson attended the University of Alabama where she graduated in December, 1974, with a "B" average. Ms. Rawlinson's major course of study at the University was correctional psychology. This academic training was supplemented by research work for various professors in the Correctional Psychology Department and part-time employment with the Tuscaloosa City Police Department, Juvenile Division.

Prior to her graduation from the University of Alabama, Ms. Rawlinson applied with the Alabama Personnel Board for the position of correctional counselor trainee with the Board

of Corrections. Ms. Rawlinson's application was rejected because she did not meet the minimum weight requirement of 120 pounds as provided by Alabama Code, Title 55, § 373-(109) (1973 Supp.). This statute requires all applicants and appointees for law enforcement officers[6] in Alabama to meet the qualifications listed below:

> (a) Age.—The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.
>
> (b) Education.—The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.
>
> (c) Police Training.—Prior to appointment, the applicant shall have completed at least 240 hours of formal police training, in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 9 months after provisional appointment and should he fail to

[6] For a definition of "law enforcement officer," see note 1 supra.

complete such training, his appointment shall be null and void.

> (d) Physical qualifications.—The applicant shall not be less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer.
>
> (e) Character.—The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law-enforcement officer attesting to his good reputation.

In conjunction with its establishment of these minimum standards, the legislature created an Alabama Peace officers' Standards and Training Commission, a body composed of seven members, four appointed by the Governor, one by the state chapter of the Fraternal Order of Police, one by the Alabama Peace Officers' Association and one by the Law Enforcement Planing Agency. This Commission is authorized in Section 373 (109) to grant waivers of the physical qualifications upon a showing of good cause. The Commission is also given the duties of studying; obtaining data, statistics, and information; and making reports concerning the recruitment, selection and training of law-enforcement officers in the state and of reviewing periodically the mini-

mum standards described for applicants and for appointees as law enforcement officers.

Testimony before this Court from Mr. James Jackson, Executive Director of the Alabama Peace Officers' Standards and Training Commission, reveals that no studies concerning the physical qualifications have been conducted by the Commission and that the Commission has never sought the advice of experts the law enforcement field as to the pertinence of height and weight requirements to the job of law enforcement officer. The Commission has granted approximately four or five waivers of the height and weight restrictions, one of those being to a female applicant to the City Police Department of Gadsden, Alabama. The Department of Public Safety and the Board of Corrections, the two state agencies involved in this case, have never requested a waiver from the Alabama Peace Officers' Standards and Training Commission, and apparently have no standard procedure to inform the applicant of his or her right to request a waiver.[7]

After receiving her letter of rejection, Ms. Rawlinson sought further explanation. An employee of the Board of Corrections was contacted who informed Ms. Rawlinson that she could not be accepted as a correctional counselor trainee unless she met the minimum weight requirement. Ms. Rawlinson's next step was to file a complaint with the Birmingham office of the Equal Employment Opportunity Commission alleging that the state's height and weight restrictions were sexually discriminatory. No action was taken by the Commission, and on January 15, 1976, Ms. Rawlinson was

[7] The letter Ms. Rawlinson received from the State Department of Personnel made no reference to a waiver and neither did the card received by Ms. Mieth. Ms. Rawlinson has also testified that no one at the Board of Corrections mentioned the possibility of a variance.

given her "right to sue" letter.

C. Statistical Evidence.

The latest United States Census[8] indicates that 52.75 percent of the total population of Alabama that is 14 years of age or older is female. Only 36.2 percent of these women are classified as being in the labor force, as compared to 69.1 percent of the men. Stated differently, females comprise only 36.89 percent of the total labor force in Alabama that is 14 years old or older. In the 20-44 year age bracket, the group comprising the potential labor pool for law enforcement officers in Alabama, the percentage of females in the labor force is 37.34 percent. As we have noted earlier, there are no women employed as State Troopers in Alabama by the Department of Public Safety. This is not surprising as the 5'9" height and 160 pounds weight requirements screen virtually all women from the job. Only .68 percent of the women in the United States between the ages of 18-79 years surveyed in 1960-62 were 5'9" or more in height while 37.25 percent of their male counterparts grew to this level.[9] This same survey reveals that 58.58 percent of the men and 22.66 percent of the women in the United States between the ages of 18-79 years weigh 160 pounds or more.[10] When heights and weights are combined, a 5'9" height and a 160 pound restriction would include 16.98 percent of the male population between the ages of 18-34 years but only .65 percent of the female population.[11]

[8] 1970 Census, General Social and Economic Characteristics. Ala-
[9] United States Department of HEW Public Health Services, National Center for Health Statistics, **Weight by Height and Age of Adults, United States 1960-1962, Series 11, Number 14, May 1966, Table 3** (Hereinafter cited as **Height and Weight Report**) In the 18-44 year age bracket, 98.8 percent of the women would be excluded by a 5' 9" height restriction.
[10] **Height and Weight Report, Table 4.**
[11] **Height and Weight Report, Tables 7-8, 15-16.**

Turning now to the Alabama Prison System, it has been established that women comprise 12.9 percent of the correctional counselor (and related) positions in the entire prison system and only 3.8 percent of the correctional counselor positions at the four all-male penitentiaries.[12] Of the total number of correctional counselors hired by the Alabama Prison System, 77.24 percent are employed in these four penitentiaries. The 5'2" requirement for the job of correctional counselor operates to exclude 33.29 percent of the women in the United States between the ages of 18-79, while excluding only 1.28 percent of the males.[13] The 120 pounds weight restriction excludes 2.35 percent of the males and 22.29 percent of the females in this 18-79 age group.[14] When the height and weight restrictions are combined, approximately 99.76 percent of the men and 58.87 percent of the women meet both these physical qualifications.[15]

CONCLUSION OF LAW

Since Ms. Rawlinson has perfected the procedural steps that must be followed before bringing a claim pursuant to 42 U.S.C. § 2000-e-2 (Title VII), her suit must be distinguished from Ms. Mieth's which arises only under 42 U.S.C. § 1983 for violation of a constitutional right. This distinction is not merely conceptual; important legal consequences now hinge upon whether the plaintiff's cause of action derives from the statutory proscription against discrimination in employment or the constitutional guarantee of equal protection. *Washington v. Davis.* —— U.S. —— (June 7, 1976) (Slip Opinion 16-17).

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[12] The percentages at each of tthese institutions are: Draper — 3.5 percent; Fountain — 5.3 percent; Holman — 3.4 percent; and Kilby — 3.0 percent.

[13] **Height and Weight Report,** Table 3.

[14] **Height and Weight Report,** Table 4.

[15] **Height and Weight Report,** Tables 7-8, 15-16.

Under Title VII, when an employment practice has a substantially disproportionate effect upon a protected minority, discriminatory purpose need not be proved. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Once a Title VII plaintiff has demonstrated a prima facie case of discrimination under this disproportionate impact analysis, the burden shifts to the employer to prove that the disqualifying employment practice has a "manifest relationship to the employment in question." *Id.* at 432. Should the employer fail to meet this burden, the plaintiff may prove that the challenged requirement is but a pretext for discrimination by showing that other selections devices which do not have a discriminatory impact would serve the employer's legitimate interest in "efficient and trustworthy workmanship." *MsDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801 (1973). *Accord, Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

In cases where religion, sex, or national origin is a "bona fide occupational qualification (bfoq) reasonably necessary to the normal operation of that particular business or enter prise," employers are free under Title VII to treat their employees differently on the basis of these categories. 42 U.S.C. § 2000e-2 (1970).

Courts, however, have treated the bfoq doctrine as a narrow exception to the general rule that there must be equality of employment opportunities. In *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied* 404 U.S. 950 (1971), the Fifth Circuit held that being a female was not a bfoq for the job of flight cabin attendant. The district court in that case had held contrary for the following reasons: (1) its view of Pan Am's history of the use of flight attendants; (2) passenger preference; (3) basic psychological reasons for the preference; and (4) the actuali-

ties of the hiring process. See 442 F.2d at 387. Judge Tuttle, writing for the Fifth Circuit, rejected any notion that the business necessity test was nothing more than business conveniences. The following standard was prescribed: "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively," *Id.* at 388. Applying this standard, the court found that the primary mission of an airline is to transport passengers safely from one place to another and that there was no evidence that having male flight attendants would jeopardize or lessen an airline's ability to accomplish this mission. *Id.*

Labeling a job as "strenuous" and then relying on the stereotyped characterization of women will not meet the burden of demonstrating a bfoq. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). There must be some objective, demonstrate evidence that women cannot perform the duties associated with the job. *See Id. at* 236.

The Supreme Court has recently held that this probing scrutiny by the courts into the employment decisions or executives and administrators under Title VII is not the appropriate analysis for alleged constitutional violations. *Washington v. Davis, supra.*... The test under the Equal Protection Clause is not one of impact but one of intent. The fact that an employment requirement operates to exclude a disproportionately larger number of blacks than whites or women than men does not by itself make out a case of invidious discrimination. Only when the plaintiff proves that the discrimination was purposeful has the Constitution been violated. The court made clear, however, that evidence of a disproportionate impact is relevant to this question of intent since "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." Slip Opinion at 11.

The height and weight requirements of the defendants in this case work a disproportionate effect upon the chances of a woman's obtaining a job as either a State Trooper or correctional counselor with the State of Alabama. The statistics show that the 5'2", 120 pound requirements for the position of correctional counselor in Alabama's Prison System exclude 41.13 percent of the female population while excluding less than one percent of the male population. Accordingly, the Court finds that, in the case of Ms. Rawlinson, plaintiff has made out a prima facie case of sex discrimination and that the Board of Corrections must now prove that the height and weight requirements are job related. *McDonnell Douglas Corp. v. Green, supra.* In the case of Ms. Mieth, the disproportionate impact is even more profound as almost no woman meets the 5'9", 160 pound requirements. Should the Court conclude that these physical qualifications are intended to exclude women, we must then apply the test of whether these qualifications are rationally related to a legitimate state interest in order to determine if they are violative of the Equal Protection Clause. See *Frontiero v. Richardson*, 411 U.S. 677, 691-692 (1973).

A. State Troopers

Colonel E. C. Dothard, Director of the Department of Public Safety, testified that he feels that women should not be State Troopers. Considering these statements of Colonel Dothard, together with the statistics that show that almost all women are excluded by the 5'9", 160 pound physical qualifications, the Court finds that the challenged employment requirements were intended to be discriminatory. The question now is whether these height and weight minimums are

sufficiently job related so as to be a legitimate interest of the state. Few cases have dealt with height and weight requirements for jobs as police officers and other related law enforcement positions. In *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 395 F. Supp. 378 (N.D. Cal. 1975), a 5'6" height requirement for Q-2 patrol positions in the San Francisco Police Department was challenged as sexually discriminatory. Defendants attempted to justify this height requirement on the basis of a police department legal office survey of the relationship of height to assaultive conduct against police officers. The court found that: "While the data tends to indicate that the height of officers is inversely related to the frequency and severity of resistance of their arrest attempts, it is too inconclusive and inconsistent to support a finding for either position." 395 F. Supp. at 381. Finding that defendants had not sustained their burden of proving that height was a bfoq, the court enjoined the defendants from use of this qualification. *Id.*... A California state court in *Hardy v. Stumpf*, 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1st Div. 1974) has similarly held that height and weight requirements for the position of police officer with the City of Oakland unlawfully discriminated against women. See also *Peltier v. City of Fargo*, 396 F. Supp. 710 (D.N.D. 1975).

In *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), the court did find a rational support for the height requirement of 5'8" for East Cleveland police officers, basing its decision on the findings that (1) taller officers have a psychological advantage and (2) there is an advantage of height in effecting arrests and emergency aid. 520 F.2d at 496. On the other hand, no rational support was found for the 150 pound weight requirement as weight has no correlation to physical strength or to psychological advantage. Noteworthy, East

Cleveland used other tests to determine the strength of its applicants. 520 F.2d at 497.

Colonel Dothard contends that the exclusion of women for the job is intended for their protection and for the protection of the public. Neither of these contentions is sound, however. First, women do not need protectors; they are capable of deciding whether it is in their best interest to take unromantic or dangerous jobs. See *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969). In regard to the fear that the public will not be adequately protected, there is no evidence in the record that a woman cannot perform the duties of a patrol officer.

Plaintiffs have offered into evidence the testimony of T. W. White and Peter B. Bloch, a satistician and a research analyst, respectively, who collaborated in publishing the study "Police Officer Height and Selected Aspects of Performance." The conclusion of this study is that height differences in two police departments surveyed (Wassau County, New York and Dallas, Texas), have, with one exception, had no statistically significant effect upon performance.[16] The one exception was found in the Nassau County Department where shorter officers were found to have generated more citizen complaints.[17] Recommendations based on these conclusions were as follows:[18]

> (1) Eliminate the height requirement and use a selection system based on the overall potential of the applicant for successful police work.

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[16] White, T. W. and Bloch, P. B., **Police Officer Height and Selected Aspects of Performance**, 6 (Police Foundation, October 1975).
[17] **Id.** at 8. There was one complaint for every 16 man-years worked by officers who were 69 inches or shorter, compared to one complaint for every 73 man-years worked by taller officers.
[18] **Id.** at 9.

(2) Provide training for o fficers addressed to skill development in areas thought by police professionals to involve a height-performance relationship..

Peter B. Bloch also worked on another report published by the Police Foundation (a non-profit organization founded by the Ford Foundation) which studied the performance of women patrol officers in the Metropolitan Police Department of the District of Columbia. The conclusion of this report was that it was appropriate from a performance viewpoint to hire women for patrol assignments on the same basis as men.[19] The compilers of the report observed both men and women officers responding to calls for police assistance and encountering in like measure citizens who were dangerous, angry, violent, drunk, or upset. Similar results were achieved by both men and women. The principal difference observed between the sexes was that women patrol officers as a group made fewer arrests and gave fewer traffic citations than male police officers.[20] Mr. Bloch's works have been previously relied upon by this Court (Judge Johnson) in *Jordan v. Wright*, Civil Action No. 75-19-N (M.D. Ala., filed March 12, 1976), where it was found that "there is no reason from a performance viewpoint for not utilizing women in the Montgomery Police Department on the same basis as men." Mr. Bloch testified in this case that it was his opinion that if a person was able to perform effectively as a municipal police officer, he or she would also be able to perform effectively as a State Trooper. He also testified that driving a police vehicle is the only skill to which height is definitely related. It was his knowledge that the District of Columbia Police Department has concluded that officers who were

[19] Bloch, P. and Anderson, D., **Policewoman on Patrol**, 1 (Police Foundation, 1974).

[20] **Id.** at 2.

shorter than 5'0" or taller than 7'0" could not adequately drive patrol vehicles. Mr. Bloch believes that a height requirement more restrictive than this would be non-purposive.

Based on this evidence in the record, the Court holds that the 5'9", 160 pound height and weight requirements set by the Department of Public Safety for the job of State Trooper are not rationally related to the achievement of any legitimate state interest and therefore violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In so doing, this Court respectfully differs with the United States Court of Appeals for the Sixth Circuit isofar as the height requirement is concerned.[21] The basis of our disagreement is apparently due to that court's reliance on evidence in the record before it of the psychological advantage of taller officers and their enhanced abilities in effecting arrests and emergency aid.[22] The credible evidence in this case is to the contrary. Tall officers do not hold an advantage over their smaller colleagues in the job performance. As for the "psychological advantage," this Court doubts that such a finding, insofar as it is no measure of job performance, is sufficient constitutional justification for blanket exclusion from employment of all individuals under a specified height. One lesson the women's rights movement has taught us is that many long-held conceptions concerning the sexes have been found to be erroneous when exposed to the light of empirical data and objectivity.

B. Correction Counselors

1. Height and Weight Requirements

[21] See **Smith** v. **Troyan**, discussed **supra.**

[22] In making these findings the court relied exclusively on the testimony of three officials in the defendant police department and not on the results of any objective studies. See 520 F.2d at 496.

The 5'2", 120 pounds height and weight requirements for the job of correctional counselor are just as infirm as the 5'9", 160 pound requirements used by the State Troopers. Mr. Judson Locke, Commissioner of the Board of Corrections, testified in support of these physical requirements. Commissioner Locke's sole contention concerning the job relatedness of these physical requirements was that they were related to strength. Undeniably, body height and weight have some relationship to strength, but we are unconvinced that a person below an arbitrarily defined level would invariably lack the necessary strength to perform the required tasks.

Plaintiffs have submitted testimony from two expert witnessed that height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor. One of these experts is Mr. Raymond Nelson, who is presently Warden at the Metropolitan Correctional Center in Chicago Illinois. Mr. Nelson has twenty years' experience in the corrections field, having held positions as Assistant Director of Corrections for the City and County of Denver, Colorado. In the prison presently under Mr. Nelson's supervision, there are no height and weight restrictions for correctional counselor other than the requirement that a person's height and weight be proportionate. A course in self-defense training is given each counselor after employment. Plaintiffs' other expert witness on height and weight of prison guards was Mr. C. Robert Sarver, a professor at the University of Arkansas at Little Rock in the Graduate School of Social Work and School of Law. Mr. Sarver is the former Commissioner of the Arkansas Department of Corrections and the Department of Corrections for the State of West Virginia. During his tenure with the West Virginia prisons (1966-1968), the department did not impose minimum height

and weight requirements for the position of prison guard. Mr. Sarver has concluded from his experience as a prison administrator that there is no positive correlation between a person's height and weight and his or her ability to perform as a prison guard.

If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength. The crude rule of thumb provided by height and weight levels impermissibly restricts qualified individuals without giving them an opportunity to demonstrate their merit. Apparently the drafter's of Alabama Code, Title 55, § 373 (109) intended the 5'2", 120 pounds standards to be rebuttable. Testimony from Mr. James Jackson, Executive Director of the Alabama Peace Officers' Standards and Training Commission, indicates that the waiver provided for by the statute has developed into a remarkably informal and subjective administrative procedure:

Q. Would you outline for me, please, the procedure you have implemented pursuant to Section 7D for granting of a waiver?

A. The hiring agency, or an individual—if they have been rejected for some employment for the two sections, the height and weight may either in writing—no forms are filled out, just submit to the Commission in writing for us to either waive it, and I, generally — I say I generally, I do issue an administrative decision back to the hiring agency which requests this.

Q. What do you use as a basis for your own administrative decision as to whether to waive it in a particular case?

A. Just the regular—I am trying to think like in a doctor's office, your height and weight according to your—

Q. (Interrupting) Do you use a particular height and weight chart?

A. No particular, no sir.

Q. Well, what kind of chart do you use? Do you have one you refer to all the time?

A. Well, I don't refer to the chart directly myself. I say as long as they meet, in my letter, in my administrative decision, they meet this requirement in fact.

Q. When you say, "meet this requirement," how do you spell it out in your letter?

A. Really, I don't know how I spell it out. I just tell them that this is what they can do.

This Court finds that, while a valid waiver provision may save Title 55 § 373(109) from being unlawful discrimination on the basis of sex, the facts have established that the Department of Public Safety has never sought to waive the height and weight minimums, nor did it inform the plaintiff Mieth in this case of her right to request a waiver. Moreover, the administrative practice of the Alabama Peace Officers' Standards and Training Commission in acting upon waiver requests hardly comports with fundamental fairness. Accordingly, the Court finds that the height and weight requirements have been discriminatorily applied in the case of Ms. Rawlinson in violation of Title VII.

2. Regulation 204

The reason propounded by the prison administrators for Regulation 204 is that they feel that women would not be able to perform adequately and safely within the setting of an all-male penitentiary. The overcrowding, violence, and other deplorable conditions that led to the court order in *James v. Wallace, supra,* are cited in support of this view. Many of the prisoners (the state estimates approximately 20 percent) housed in the all-male penitentiaries have committed sexually related crimes. The prison administrators believe that the presence of women in an environment where there are no heterosexual outlets would unnecessarily arouse and possibly even incite the inmates. The prisoners' right of privacy is also advanced. Because shower and toilet facilities at the penitentiaries are communal, the naked bodies of the male prisoners would be exposed to female correctional counselors or vice versa in the case of female penitentiaries.

The state seemingly defeats its stated purpose for Regulation 204, however, by employing females in contact positions at all-male institutions other than the four large penitentiaries. At the Mobile Work Release Center (MWRC), a minimum security institution, seven correctional officers are assigned to supervise 46 inmates. Two of these seven correctional officers are women who perform the identical duties of their male colleagues, with the exception that naked searches and frisks of the inmates are performed by the male officers. While Mr. Tony Sewell, Director of the MWRC is of the opinion that women do not perform this job as well as men, he nonetheless rates one of the women as a good employee. [23]

[23] Mr. Sewell's opinion as to the abilities of women seems in large measure attributable to the performance of one female correctional counselor under his supervision. If a woman cannot or does not perform her assigned duties, she may be suspended or removed permanently from her job, an action Mr. Sewell has recommended in the case of this particular female employee. This is no reason, however, that all women cannot adequately perform.

Bill Gilmore, Director of the Frank Lee Youth Center (FLYC), has testified that six of the sixteen correctional counselors at the FLYC are women. The toilet and shower facilities at this institution are communal and open like those in the large penitentiaries. Duties of these women counselors include walking through the dormitories, making body counts during normal hours and after lights are out, making inspection rounds through the shower room area even during use, and, in some instances, participating in shakedowns that involve frisking and searching the bodies of the inmates. These are the identical duties of the male correctional officer. The position of the Board of Corrections in regard to the privacy of the inmates at the FLYC is totally inconsistent with the position taken at the large penitentiaries.

Testimony of plaintiffs' expert witnesses demonstrates the varying opinions in the corrections community concerning the privacy of inmates. Mr. C. Robert Sarver, whose credentials have been discussed, supra, believes that women guards do not infringe on the inmates' right to privacy any more than male guards. Mr. Ray Nelson, also previously mentioned, has testified that in his prison women perform exactly the same duties as men with only the exception of strip searches. Both Mr. Sarver and Mr. Nelson agree that the presence of women in all-male prisons contributes to the normalization of the prison environment which has an advantageous psychological effect upon the prisoners. A recent policy statement by the Federal Bureau of Prisons in fact states that:

> The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. This integration of staff of both sexes into all institutions will promote this development.

Federal Prison System, Police Statement No. 3713.7, dated January 7, 1976.

This Court is of the opinion that this tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications. According to testimony given by Commissioner Locke, only a small percentage of the correctional counselor work force is involved in conducting systematic strip searches.[24] We are convinced that procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job. See *Reynolds v. Wise*, 375 F. Supp. 145, 151 (N.D. Tex. 1974) Accordingly, this Court holds that Regulation 204, insofar as it denies women jobs as prison guards in all-male prisons, is violative of Title VII and the Equal Protection Clause.

REMEDIES

In view of the above findings of fact and conclusions of law, the following relief will be granted:

1. Defendants will be enjoined from denying plaintiffs and the classes they represent the jobs of State Trooper and correctional counselor solely on the basis of their failure to meet minimum height and weight requirements.

2. The Board of Corrections of the State of Alabama will be enjoined from enforcing Administrative Regulation 204.

---

[24] The Commissioner estimated that at Fountain only 5-7 guards out of a total 18-20 performed strip searches, and at Draper only 4 out of 18-20.

3. Defendants shall be required to assign, promote, and compensate all female State Troopers and correctional counselors on an equal basis with their male counterparts. This shall not preclude, however, selective work responsibilities for correctional counselors to respect the inmates' right of privacy.

4. Within thirty (30) days of the effective date of this Court's order in this case, defendants shall be required to implement a recruiting program specifically designed to inform women of their opportunity to become State Troopers with the Department of Public Safety and correctional counselor trainees with the Board of Corrections and to encourage women to apply for such positions. Such recruiting efforts shall stress the equal role of men and women in these positions and shall provide information as to how and where to apply, salaries, and fringe benefits.

5. Within six months of the date of this order, defendants shall be required to file with this Court a detailed report reflecting compliance with this Court's order in this cause.

This Court will not grant plaintiffs' request for preferential treatment of Ms. Mieth's and Ms. Rawlinson's job applications and for a preferential hiring scheme for all women. In this connection the Court takes judicial notice of the strong state interest in preserving the integrity of the merit system of employment and, furthermore, the Court is confident that women can successfully compete with men for these jobs on a competitive basis. Finally, the Court will stay resolution of plaintiffs' request for accumulated pay pending the decision by the United States Supreme Court in *Bitzer v. Fitzpatrick, cert. granted* December 15, 1975, 44 U.S.L.W. 3358. *Bitzer* presents the question, controlling also in this

case, of whether the Eleventh Amendment prohibits federal courts from awarding accumulated monetary relief against a state in favor of state employees who allege that they were victims of discriminatory state laws that violated Title VII of the 1964 Civil Rights Act as amended in 1972. Jurisdiction will be retained pending this stay.

An appropriate order will be entered accordingly.

Done, this the 28th day of June, 1976.

RICHARD T. RIVES
United States Circuit Judge

FRANK M. JOHNSON, JR.
United States District Judge

R. E. VARNER
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRENDA M. MIETH and DIANNE K. RAWLINSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

E. C. DOTHARD, individually and in his official capacity as Director of the Department of Public Safety, his agents, servants, assigns, and successors in office; ALABAMA BOARD OF CORRECTIONS; THOMAS F. STATON; REV. J. VICKERS; R. H. ROBINSON; MARION CARROLL, JR., and C. E. CARMICHAEL, JR., individually and in their official capacities as members of the Alabama Board of Corrections, their agents, servants, assigns, and successors in office; JUDSON LOCKE, individually and in his official capacity as Alabama Commissioner of Corrections, his agents, servants, assigns and successors in office; STANLEY FRAZER, individually and in his official capacity as

CIVIL ACTION

NO. 75-433-N

Director of the Alabama Personnel Board, his agents, servants, assigns, and successors in office; ALABAMA PERSONNEL BOARD; RALPH ADAMS; D. KYSER WILSON, and C. W. ANDERSON, individually and in their official capacities as members of the Alabama Personnel Board, their agents, servants, assigns and successors in office; ALABAMA PEACE OFFICERS STANDARDS AND TRAINING COMMISSION; WALKER HOBBIE; E. L. WRIGHT, JR.; ERNEST KENTRELL; A. E. COOPER; RICHARD HEARN; TAYLOR WILKINS; and JAMES JACKSON, individually and in their official capacities as members of the Alabama Peace Officers Standards and Training Commission, their agents, servants, assigns, and successors in office,

Defendants.

JUDGMENT

Pursuant to the findings of fact and conclusions of law incorporated, as authorized by Rule 52, Federal Rules of Civil Procedure, in the opinion of this Court made and entered herein this date, it is the ORDER, JUDGMENT and DECREE of this Couht that:

1. The defendants, their agents, servants, employees, and others who may act in concert with them be and each is hereby ENJOINED from denying plaintiffs and the classes they represent positions as State Trooper or correctional counselor solely on the basis of their failure to meet minimum height and weight requirements.

2. The Board of Corrections of the State of Alabama, its agents, servants, employees, and others who may act in concert with the Board be and each is hereby ENJOINED from enforcing the Board's Administrative Regulation 204.

3. The defendants, their agents, servants, employees, and others who may act in concert with them be and each is hereby ENJOINED from failing to assign, promote and compensate all female State Troopers and correctional counselors on an equal basis with their male counterparts. (This part of the Court's judgment will not preclude selective work responsibility for correctional counselors made for the purpose of respecting the inmates' rights of privacy.)

4. The defendants, their agents, servants, employees, and others who may act in concert with them be and each is hereby ENJOINED from failing, within 30 days of the date of this order, to implement a recruiting program specifically designed to inform women of their opportunity to become State Troopers with the Alabama Department of Public Safety and correctional counselor trainees with the Alabama Board of Corrections; said recruitment program will include the encouragement of women to apply for such positions and shall stress the equal role of men and women in said positions and shall provide information as to how and where to apply, salaries, and fringe benefits.

5. The defendants shall within six months of the date of this order file with this Court and each member thereof a detailed report reflecting compliance with this order.

6. Plaintiffs' request for preferential treatment of Ms. Mieth's and Ms. Rawlinson's job applications and for a preferential hiring scheme for all women be and is hereby denied.

7. Plaintiffs' request for accumulated pay and the question of whether the Eleventh Amendment prohibits an award of accumulated monetary relief against the State of Alabama in favor of state employees who have been discriminated against be and each is hereby stayed pending further order of this Court.

8. The jurisdiction of this cause be and is specifically retained.

Done, this the 28th day of June, 1976.

RICHARD RIVES
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

R. E. VARNER
United States District Judge

APPENDIX C

CODE OF ALABAMA

TITLE 55, § 373(109)

(1940) (Recomp. 1958)

Minimum standards for applicants and appointees as law-enforcement officers; employment of applicants; qualifications. — The minimum standards hereafter in this section provided shall apply to applicants and appointees as law-enforcement officers who are not law-enforcement officers in the state on the effective date of this article and to applicants and appointees who, though law-enforcement officers on the effective date of this article, cease to be law-enforcement officers before making application for employment as a law-enforcement officer or being employed as a law-enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on the effective date of this article a law-enforcement officer and who continues until the date of his application as a law-enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant, and showing compliance with the following qualifications:

(a) Age. — The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(b) Education. — The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(c) Police training. — Prior to appointment, the applicant shall have completed at least 240 hours of formal police training, in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the Commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 9 months after provisional appointment and should he fail to complete such training, his appointment shall be null and void.

(d) Physical qualifications. — The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(e) Character. — The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law-enforcement officer attesting his good reputation.

The foregoing requirements shall not apply to any person who is presently employed as a law-enforcement officer in the state and who continues to be so employed when he makes application for or is employed as a law-enforcement officer in a different capacity or for a different employer. (1971, No. 1981, p. 3227, § 7, appvd. Sept. 20, 1971; 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

APPENDIX D

Selective Certification

Correctional Counselor I Positions

I. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactory completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000c of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5. Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel

Department whenever a position is being filed which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedure established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect the power of the Commissioner to hire or discharge any employee.

V. REFERENCES

12. Title 45-2000C, United States Code

13. Letter from the General Council of the Equal Employment Opportunity Commission.

J. C. LOCKE, JR.
Commissioner

Annex A—(Same as No. 13)

Mr. J. C. Locke, Jr.
Commissioner
State of Alabama
Board of Corrections
Montgomery, Alabama 36104

Dear Commissioner Locke:

We have received your letter dated October 6, 1975 requesting an advisory opinion with regard to hiring only female correctional counselor trainees to work in all-female

prisons, and only male correctional counselor trainees to work in all-male prisons.

We have noted in you letter that you are being funded by the Law Enforcement Assistance Administration (LEAA) to hire and provide training for correctional counselor trainees; that male correctional counselor trainees who are employed at all-female prisons are in non-contact slots (outergate and tower), and female correctional counselor trainees who are employed at all-male p isons are in non-contact slots (outergate and tower); that the job at issue calls for frequent inspection and patrol of restrooms and showers thereby invading the privacy of prisoners, and would place female employees in all-male prisons in danger of sexual or other attack due to sexual deprivation; that no firearms are carried by correctional counselor or security personnel; and that there is a low ratio of security personnel to inmates.

Please note that this letter is not an opinion letter pursuant to 29 C.F.R. §1601.30.

Section 703 (e) of Title VII of the Civil Rights Act of 1969, as amended, 42 U.S.C., 2000e-e), states as follows:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise . . .

The regulation at 29 C.F.R. §1604.2, 37 F.R. 6836 (April 5, 1972) states as follows:

> (a) The Commission believes that the bona fide occupation exception as to sex should be interpreted

narrowly. Labels—'men's jobs' and 'women's jobs' —tend be deny employment opportunities unnecessarily to one sex or the other.

> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> > (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
> >
> > (ii) The refusal to hire an individual based on stereotyped characteristics of the sexes . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any the group.
> >
> > (iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

Many courts have interpreted the statute and regulations dealing with sex discrimination and the B.F.O.Q. exception.

Relevant Case Law

In cases analagous to the one at issue, courts have held that employers may rely upon the B.F.O.Q. exception in order to employ or to assign like-sexed employees to work with inmates in correctional institutions.

There are several cases which you should examine which are helpful in the analysis of the question you raise.

In *Long v. State Personnel Board*, Calif. Ct. App. 116. No. Cal. Rtpr. 562 (1974), 8 EPD Para. 9745, the court held that under Title VII, 1/ there was no sex discrimination, due to application of the B.F.O.Q. exception, where the state refused to hire a female chaplain to work at an all male youth correctional institution. The Court said that generally there are three overall interests to consider: plaintiff's interest, the wards' interest and the public interest. The Court considered the safety problem for the female chaplain who would be counselling, frequently, quite far away from male employees, youths whose average age was 19½ and whose physical control could not be guaranteed. The Court also considered the element of privacy of the inmates who lived in various states of undress in their dormitories where the chaplain would be expected to be from time to time. Also see *City of Philadelphia v. Pennsylvania Human Relations Commission* 7 Pa. Commonwealth 500, 300 A2r-97 (1973), 5 EPD Para. 8538, where the Court held that under a state law where the definition of B.F.O.Q. was intended to be the same as the one under Title VII, the state must grant the City of Philadelphia a B.F.O.Q. exception for youth center supervisor jobs, allowing the city to hire only like sexed supervisors for single sexed youth correctional institutions. In this case, although the Court discussed and was concerned about danger to employees and the privacy of the inmates it was also concerned about the age of the inmates and their special counselling and privacy needs.

In *Reynolds v. Wise*, 378 F. Supp, 147 (N.D. Texas 1974) 8 EPO Para. 9778, the Court held that a female employee

at a state correctional institution for adult males had to be returned to her job in the mail room which had previously been filled by a man who was given a rotation every six months, which rotation involved counselling and other contact with the inmates. The female was to be given these extra assignments when returned to he previous mail room job in the order to prepare her for promotions, but the Court also noted the following:

> Selecting work responsibilities among correctional officers excluding from the duties of women assignment to dormitories or shake-down is reasonable to insure privacy of inmates and does not discriminate against women. *Reynolds v. Wise, supra at* 151.

In those cases discussing correctional work done outside an institutional setting, the Courts examine the nature of the work. In *Button v. Rockefeller*, 6 EPD Para. 8835, (N.Y. Sup. Ct. Sept. 10, 1973) a case brought under the New York Executive Law Section 296, the Court held that the State's hiring of four women as state troopers whose scores were below the scores of a male applicant, was not discriminatory because women were needed in order to search other women and do undercover work. On the other hand, the Court in *Tracey v. Oklahoma, Dept. of Corrections*, § EPO Para. 9713 (W.D. Okl. May 23, 1974) found that there was nothing in the nature of the jobs as probation or parole officers which would justify using separate hiring lists. The Court found that these jobs did not fit within the B.F.O.Q. exception.

Although not concerning correctional officers, also of relevance to the question you raise is the case of *Hodgson v.*

---

[1] The Court also found no violation under the Federal or State Constitutions.

Robert Hall Clothes, Inc., 473 F. 2d 589 (3rd Cir. 1973) 5 EPO Para. 8434, *cc t. denied* 414 U.S. 866 (1973), 6 EPO Para. 8861, wherein one question was whether or not the Equal Pay Act was applicable in a situation where sex-segregated job classifications were permissible as a B.F.O.Q. The Appellate Court noted the finding by the District Court that there was a valid reason for having a sex segregated sales force, which was "the frequent necessity for physical contact because the sales persons and the customers which would embarrass both and would inhibit sales unless they were of the same sex." *Hodgson v. Robert Hall Clothes, Inc., supra* at 592 citing District Court opinion at page 1269. 2/

Conclusion And Recommendations

The statute, regulations and cases under Title VII suggest that you carefully evaluate each assignment in order to determine whether the B.F.O.Q. exception would apply. Some guidelines for you to consider when making your determination are as follows: the public interest and the interest of employees in minimizing danger, and the interest of the inmates in their own personal privacy. It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions. Wherever possible, these employees should be given the opportunity to perform their work with the state's firm guidance on curtailment of assignments which endanger the employees, the public and/or invade the personal privacy of the inmates. Since counselling should be stressed in order to upgrade the jobs involved, it is suggested that you can provide areas where employees and inmates can benefit from this part of the work, without regard to the sex of the employee or inmate.

---

2 But see **Cianciolo t/a Galaxy Massage Parlor v. Members of City Council, Knoxville, Tennessee** 376 F.Supp. 719 (E.D. Tenn. 1974), 8 EPD Para 9708 where the Court found that the city ordinance prohibiting bisexual massages was in conflict wis Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2.

If you need further information in the future, please do not hesitate to write again or to call.

Sincerely,

ABNER W. SIBAL
General Counsel

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

BRENDA M. MIETH and DIANNE RAWLINSON, individually and on behalf of all others similarly situated	)	
PLAINTIFFS	)	
VS.	)	CIVIL ACTION NO. 75-433-N
E. C. DOTHARD, individually and in his official capacity as Director of the Department of Public Safety, et al.	)	
DEFENDANTS	)	

NOTICE OF APPEAL

TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Alabama Board of Corrections; Thomas F. Staton, Rev. J. Vickers, R. H. Robinson, Marion Carroll, Jr., and C. E. Carmichael, Jr., individually and in their official capacities as members of the Alabama Board of Corrections, their agents, servants, assigns, and successors in office; Judson Locke, individually and in his official capacity as Alabama Commissioner of Corrections, his agents, servants, assigns and successors in office, defendants in the above entitled actions, hereby appeal to the Supreme Court of the United States from that part of the final judgment that pertains to the above named defendants entered in this action on June 28, 1976.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

GARY R. MAXWELL
Assistant Attorney General

G. DANIEL EVANS
Assistant Attorney General

DAVID G. FLACK
Attorney for Board of Corrections

COUNSEL FOR DEFENDANTS

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal to all Attorneys of record by placing same in the United States Mail, postage prepaid and properly addressed this 23rd day of July, 1976.

GARY R. MAXWELL
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Walter S. Turner, Assistant Attorney General of Alabama, one of the attorneys for appellants, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 21st day of September, 1976, I did serve the requisite number of copies of the foregoing Jurisdictional Statement and Appendices on the Attorneys for the Appellee, by mailing the same to them, first class postage prepaid, and addressed to them as follows:

Honorable John Carroll
Honorable Pamela Horowitz
Southern Poverty Law Center
101 South Hull Street
Montgomery, Alabama

WALTER S. TURNER
Assistant Attorney General of Alabama

ADDRESS OF COUNSEL

Attorney General's Office
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Telephone: 205-834-5150

Supreme Court, U. S.
FILED
JAN 24 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-422

E. C. DOTHARD, ET AL,
APPELLANTS

VERSUS

BRENDA M. MIETH, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF ALABAMA

DOCKETED SEPTEMBER 21, 1976

PROBABLE JURISDICTION NOTED NOVEMBER 29, 1976

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-422

E. C. DOTHARD, ET AL,
APPELLANTS

VERSUS

BRENDA M. MIETH, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

DOCKETED SEPTEMBER 21, 1976

PROBABLE JURISDICTION NOTED NOVEMBER 29, 1976

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UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA

Civil Action File No. 75-433-N

BRENDA M. MIETH and DIANNE K. RAWLINSON, individually and on behalf of all others similarly situated,

Plaintiff s,

v. SUMMONS

E. C. DOTHARD, individually and in his official capacity as Director of the Department of Public Safety, his agents, servants, assigns, and successors in office, et al.,

Defendant s.

To the above named Defendants more fully set out in the attached complaint:

You are hereby summoned and required to serve upon John L. Carroll
plaintiff's attorney, whose address 1001 South Hull Street, Montgomery, Alabama 36104
an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JANE P. GORDON
Clerk of Court.
MARGARET HOPE
Deputy Clerk.
[Seal of Court]

Date: December 9, 1975

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Caption of Complaint Omitted*

COMPLAINT

I. Nature of Controversy

This is a civil action brought by Brenda M. Mieth and Dianne K. Rawlinson, suing individually and as class representatives. Plaintiff Mieth attacks the Alabama Department of Public Safety's historic and continuing practice of intentional discrimination against women in the recruiting and hiring of State Troopers. Both Plaintiff Mieth and Plaintiff Rawlinson challenge the promulgation and use of height and weight minimums for employment as state law enforcement officers on the ground that said minimums are intended to and do discriminate against women. The suit seeks declaratory and injunctive relief and the implementation of a hiring ratio in the employment of State Troopers to redress the effects of defendants' blatant discrimination on the basis of sex.

II. Jurisdiction

This action arises under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §§ 1983 and 2000e - 5(f). Jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and § 1343(3). The amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs. Plaintiff Rawlinson has satisfied all the jurisdictional prerequisites to suit under 42 U.S.C. § 2000e - 5(f). Plaintiffs seek, *inter alia*, a declaration of their rights and the rights of the class and subclasses under 28 U.S.C. § 2201. A three-judge court is requested pursuant to 28 U.S.C. § 2281.

III. Class Action

Plaintiffs bring this action on their own behalf and on behalf of all women who might be employed or are applicants for employment as state law enforcement officers as that term is defined by Title 55, § 373(108), Code of Alabama

1940 (Recomp. 1958) (1973 Cum. Supp.). Plaintiff Mieth also represents a subclass of all women who might be employed or are applicants for employment with the Department of Public Safety for the position of State Trooper. Plaintiff Rawlinson also represents a subclass of all women who might be employed or are applicants for employment with the Board of Corrections for the position of Correctional Counselor. There are common questions of law and fact affecting the members of the class and subclasses, and these common questions predominate over any questions affecting only individual members. The claims of the plaintiffs are typical of the claims of the class and subclasses. The members of the class and subclasses are so numerous as to make it impracticable to bring them all before the court, and the interests of the class and subclasses are adequately represented by the individual plaintiffs. The class action is the superior and most efficient method for fair adjudication of this controversy.

IV. Parties

A. Plaintiffs

1. Brenda M. Mieth is a 28 year-old female. She is a citizen of the United States and a resident of Montgomery, Alabama.

2. Dianne K. Rawlinson is a 22 year-old female. She is a citizen of the United States and a resident of Montgomery, Alabama.

B. Defendants

1. E. C. Dothard is the Director of the Department of Public Safety. As such he is empowered to appoint all employees of said Department, Title 36, § 58(57), Code of Alabama 1940 (Recomp. 1958), and is the principal supervisory authority in that department.

2. The Alabama Board of Corrections is vested with the power to appoint employees of the Alabama Correctional

System. Title 45, § 10(4), Code of Alabama 1940 (Recomp. 1958).

3. Thomas F. Staton, Rev. J. Vickers, Thomas F. Bradford, Sr., and Marion Carroll, Jr., are the present members of the Alabama Board of Corrections. Each is a citizen of the United States, over the age of 21, and a resident of Alabama.

4. Judson Locke is the Alabama Commissioner of Corrections. As such, he is the principal supervisory authority in the Alabama correctional system.

5. Stanley Frazer is the Director of the Alabama State Personnel Board. Under Title 55, §303, Code of Alabama 1940 (Recomp. 1958), he is given general supervisory responsibility for setting requirements for state merit positions. Such responsibility is exercised after consultation with the appointing officials and principal supervisory officials of the various state agencies.

6. The Alabama Personnel Board is empowered under Title 55, § 297, Code of Alabama 1940 (Recomp. 1958), to adopt, modify, or reject classifications and compensation plans as may be recommended to the Board by the State Personnel Director.

7. Ralph Adams, D. Kyser Wilson, and C. W. Anderson are the present members of the Alabama Personnel Board. Each is a citizen of the United States, over the age of 21, and a resident of Alabama.

8. The Alabama Peace Officers Standards and Training Commission (hereinafter referred to as the Commission) was created by the Alabama Legislature through Title 55, § 373(104), Code of Alabama 1940 (Recomp. 1958) (Cum. Supp. 1973). The Act creating the Commission prescribes minimum standards for applicants and appointees as law enforcement officers, § 373(109), and vests the Commission

with power to review and permit the use of higher standards, § 373(108)(c).

9. Walker Hobbie, E. L. Wright, Jr., Ernest Kentrell, A. E. Cooper, Richard Hearn, Taylor Wilkins, and James Jackson are the present members of the Alabama Peace Officers Standards and Training Commission. Each is a citizen of the United States, over the age of 21, and a resident of Alabama.

V. Facts

A. Plaintiff Mieth

1. Plaintiff Mieth is a 28 year-old female. She is 5 feet 6 inches tall and weighs 135 pounds.

2. She is a high school graduate and also has completed a one-year business college course.

3. She has 20 semester hours and 55 quarter hours towards a Bachelor's degree in Law Enforcement, in which she has maintained an A average.

4. On October 23, 1975, Plaintiff Mieth filed an application with the State Department of Personnel seeking employment with the Department of Public Safety as a State Trooper.

5. On that application, she listed her height as 5 feet 6 inches and her weight as 130 pounds.

6. Shortly thereafter, she received notification from the Alabama Personnel Department that her application for the position of State Trooper had been rejected because she failed to meet the minimum weight requirement. (*See* Attachment A.)

7. On November 3, 1974, Plaintiff Mieth met with Defendant Dothard to discuss the rejection of her application and possible waiver of the weight requirement.

8. Defendant Dothard told Plaintiff Mieth that she failed to meet both the height and weight requirements and therefore could not be employed as a State Trooper.

9. Defendant Dothard also stated that although he has no objections to women being hired into administrative positions with the State Trooper force, he did not want women out on the road on patrol because such a job was too dangerous for women to handle.

10. Plaintiff Mieth is fully qualified to serve the State of Alabama as a law enforcement officer, and the sole reason she has not been able to do is because of the arbitrary and sexually discriminatory practices and policies which permeate the Department of Public Safety.

B. Plaintiff Rawlinson

1. Plaintiff Rawlinson is a 22 year-old graduate of the University of Alabama.

2. In August, 1974, preparatory to receipt of her degree in December, Plaintiff Rawlinson filed an application with the State of Alabama Personnel Department for the position of Correctional Counselor Trainee.

3. On said application, Plaintiff Rawlinson listed her height as 5'2" and her weight as 110 pounds.

4. Plaintiff Rawlinson's application further reflected that, in December, 1974, she would receive her degree from the University of Alabama in psychology, with a concentration in correctional psychology.

5. After submitting her application, Plaintiff Rawlinson received a postcard from Defendant Personnel Department indicating that her application was unacceptable because of her weight. Plaintiff Rawlinson then wrote a letter to Defendant Personnel Department requesting a full explanation of her rejection.

6. In response, Defendant Personnel Department, by letter dated October 23, 1974, (*see* Attachment B) informed Plaintiff Rawlinson that her application for Correctional Counselor Trainee had been rejected because she did not meet the minimum weight requirements for law enforcement offi-

cers established under Alabama law.

7. Plaintiff Rawlinson then filed, in early November, 1974, a charge with the EEOC District Office in Birmingham, Alabama, alleging that said minimum height and weight requirements are sexually discriminatory.

8. In December 1974, Plaintiff Rawlinson did receive her degree in psychology from the University of Alabama, graduating with a cumulative grade point average of 2.0 on a 3.0 scale.

9. During her senior year, Plaintiff Rawlinson was selected to participate in a program sponsored by the University's Correctional Psychology Department, under which she did research in corrections and helped edit a journal on corrections. As a participant in said program, she worked in the Tuscaloosa Police Department from May 1974 to August 1974, assigned to the Juvenile Division where she assisted in investigation and patrol. From August 1974 to December 1974, also as a participant in said program, Plaintiff Rawlinson worked in the Tuscaloosa County Juvenile Probation Department, where she served as a probation officer.

10. Although desirous of working as a law enforcement officer with the State of Alabama since December 1974, Plaintiff Rawlinson has been unable to do so. The October 23, 1974, letter which she received from Defendant Personnel Department made it clear that the minimum height and weight requirements foreclosed her from successfully applying not only for the job of Correctional Counselor Trainee but also for any other job as a "law enforcement officer," including but not limited to police officer, deputy sheriff, deputy constable, and State Trooper.

11. Plaintiff Rawlinson, whose present weight is 115 pounds, is fully qualified to serve the State of Alabama as a law enforcement officer, and the sole reason she has not been able to do so is because of the State's arbitrary and sexually

discriminatory height and weight minimums.

VI. First Cause of Action

1. Title 55, § 373(109), Code of Alabama 1940 (Recomp. 1958), which establishes "minimum standards for applicants and appointees as law enforcement officers," provides in pertinent part as follows:

> (d) The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds. . . .

2. For purposes of the above, "law-enforcement officer" is defined as "a policeman, deputy sheriff, deputy constable, and other official who has authority as such official to make arrests. It includes Alabama State Troopers or members of the State Department of Public Safety, and the Alabama Board of Corrections." Title 55, § 373(103).

3. Defendants use these statutory height and weight minimums in the selection of Correctional Counselor Trainees.

4. With respect to applicants for the position of State Trooper, defendants have promulgated regulations setting a minimum height and weight requirement of 5 foot nine inches and 160 pounds. (*See* Attachment C.)

5. Both the statutory and the regulatory height and weight minimums are used by defendants to reject female applicants.

6. The promulgation and use of minimum height and weight standards as criteria for employment has a disparate and discriminatory effect on female applicants.

7. The promulgation and use of minimum height and weight requirements has a chilling effect on potential female applicants.

8. The existence and use of minimum height and weight standards as criteria for employment discriminates against plaintiffs and the members of the class and subclasses on the

basis of their sex in violation of statutory rights guaranteed under 42 U.S.C. §§ 1983 and 2000e and in violation of constitutional rights guaranteed under the equal protection clause of the fourteenth amendment.

VII. Second Cause of Action

1. Plaintiffs reallege 1-7 of Paragraph VI.

2. The existence and use of minimum height and weight standards as criteria for employment violates statutory rights of the plaintiffs and members of the class and subclasses guaranteed by 42 U.S.C. §§ 1983 and 2000e and their constitutional right to due process of law under the fourteenth amendment.

VIII. Third Cause of Action

1. It is alleged upon information and belief that male applicants have been employed as State Troopers who did not meet the minimum height and weight standards as set forth by the Department of Personnel and the Department of Public Safety when they applied for the position.

2. It is further alleged upon information and belief that there are males presently serving as State Troopers who do not meet the minimum height and weight standards as set forth by the Department of Personnel.

3. The actions of the defendants in employing and continuing to employ male applicants who do not meet the minimum height and weight standards constitutes selective enforcement of a state regulation.

4. Such selective enforcement discriminates against Plaintiff Mieth and the members of her subclass on the basis of sex in violation of statutory rights guaranteed them by 42 U.S.C. § 1983 and of their constitutional rights under the equal protection clause of the fourteenth amendment.

IX. Fourth Cause of Action

1. It is alleged upon information and belief that defendants have maintained and continue to maintain a policy and

practice of refusing to hire women as State Troopers, solely on the basis of their sex.

2. It is alleged upon information and belief that there are no women presently employed as State Troopers.

3. Defendants' policy and practice of refusing to hire women as State Troopers, solely on account of their sex, discriminates against Plaintiff Mieth and the members of her subclass in violation of 42 U.S.C. § 1983 and the equal protection clause of the fourteenth amendment.

X. Relief

Plaintiffs and the class respectfully pray that this Court:

a. Issue its declaratory judgment that the promulgation and use of minimum height and weight standards by the defendants as criteria for employment is violative of the equal protection clause of the fourteenth amendment, the due process clause of the fourteenth amendment, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

b. Issue an injuction:

1. permanently restraining the defendants from enforcing the provisions of Title 55, § 373(109)(d), Code of Alabama 1940 (Recomp. 1958)(1973 Cum. Supp.);

2. permantly restraining the defendants from using any height and weight standards as criteria for employment.

Plaintiff Mieth and the subclass she represents respectfully pray that this Court:

a. Order the defendants to employ Plaintiff Mieth as a State Trooper.

b. Award Plaintiff Mieth back pay to the time of her application.

c. Issue its declaratory judgment that the employment practices of the defendants as regards State Troopers discriminate against women and that these defendants have engaged in a practice of sex discrimination in the recruitment and hiring of female State Troopers.

d. Award back pay to any women who have applied for the position of State Trooper but who were not hired because of the sexually discriminatory practices of the defendant.

e. Issue an injunction:

1. permanently enjoining the defendants from discriminating against women in employment as State Troopers;

2. permanently enjoining the defendants from using any employment selection criteria for State Troopers which have a disparate effect on women.

f. Order the defendants to employ one female State Trooper for each male hired until women make up 45% of the force.

g. Require that the defendants assign and promote all persons hired as State Troopers without regard to sex.

h. Require that the defendants immediately begin the use of recruiting materials and methods which stress the equal role of men and women in the State Trooper force.

Plaintiff Rawlinson and the members of her subclass respectfully pray that this Court:

a. Order the defendants to hire Plaintiff Rawlinson as a Correctional Counselor Trainee.

b. Award Plaintiff Rawlinson back pay from the date of her application.

c. Award back pay to any women who have been applicants for the position of Correctional Counselor but who were not hired because of the minimum height and weight standards.

Plaintiffs and the class respectfully pray that this Court grant such other and further relief as it may deem just and proper.

Respectfully submitted,
JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES

1001 S. Hull Street
Montgomery, AL 36104
ATTORNEYS FOR PLAINTIFFS

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at Large, personally appeared Brenda Mieth, who, being duly sworn, deposes and says that she has read the foregoing Complaint and that the facts alleged therein are true and correct to the best of her information, knowledge and belief.

BRENDA MIETH

SWORN TO AND SUBSCRIBED before me
on this 8th day of December, 1975.
JACKIE L. ALEXANDER
Notary Public

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at Large, personally appeared Dianne K. Rawlinson, who, being duly sworn, deposes and says that she has read the foregoing Complaint and that the facts alleged therein are true and correct to the best of her information, knowledge and belief.

DIANNE K. RAWLINSON

SWORN TO AND SUBSCRIBED before me
on this 8th day of December, 1975.
JACKIE L. ALEXANDER
Notary Public

Title of Position State Trooper

Class Code

You must stamp this card if you wish to be notified that your application is accepted.

Do Not Detach Cards

Your Name Brenda Mieth

Your Address c/o 4048A Amesbury

Montgomery, Alabama 36111

Print or type your name and address, class code, and title of position for which you are applying.

STATE OF ALABAMA—STATE PERSONNEL DEPARTMENT

[] Your application has been accepted for the position checked on the other side of this card, and you will be notified later of the exact time and place of the examination.

[X] Your application for the position listed on the other side of this card is not acceptable in its present form for the reasons checked below:

1. [] It does not indicate that you have had the required experience. If you have had the experience but neglected to indicate it, we will be glad to consider your application if you will submit the supplementary information immediately.
2. [X] It does not show that you meet the minimum educational requirements. Weight
3. [] Your application reached us too late for you to be scheduled for the examination.
4. []

ATTACHMENT A

October 23, 1974

Miss Dianne K. Rawlinson
1701 University Boulevard B-10
Tuscaloosa, Alabama 35401

Dear Miss Rawlinson:

The position of Correctional Counselor Trainee falls under the prescribed minimum standards for law enforcement officers as established by Alabama Law, Section 1981, dated September 20, 1971. This law (Section 7, paragraph d) states that "the applicant shall not be less than five feet two inches or more than six feet ten inches in height, shall weigh not less than 120 pounds, nor more than 300 pounds - - - - -".

Since you do not meet the minimum weight requirements as stated above, we regret that it was necessary to turn down your application for Correctional Counselor Trainee.

You did not state what other positions you applied for, but if no physical requirements were specified in the qualifications for these positions, they do not fall under the minimum standards act mentioned above.

We appreciate your interest in employment with the State of Alabama and if we can be of assistance to you in any way, please advise.

Sincerely yours,
Alvin C. Ford
Examination Technician

ACF/ea

ATTACHMENT B

FINGERPRINT CLASSIFIER (7101) Salary Range—$7,397 - $9,477

Kind of Work This employee classifies fingerprints and records classifications according to prescribed formulas; files fingerprint cards according to classification code; maintains fingerprint files; searches files for classification data and comparative purposes; indexes records using a soundex system; files and pulls records according to a soundex number; searches files for information in response to requests from other agencies; corresponds with law enforcement agencies in order to exchange identification information; takes and develops photographs of fingerprints; performs related work as required.

Qualifications Any combination of training and experience equivalent to graduation from a standard senior high school, supplemented by completion of a standard course in fingerprint classification or at least six months of closely supervised on-the-job training in fingerprint classification work.

Kind of Exam Written Test.

STATE TROOPER (7221) Salary Range—$8,749 - $10,907

Kind of Work A State Trooper enforces state laws and regulations, especially traffic laws. He patrols an assigned area in a patrol car; uses two-way telephone equipment; gives assistance to motorists; stops trucks to determine compliance with state and federal regulations; directs traffic, investigates accidents, gives first aid and safeguards property; investigates crimes or complaints, makes reports of findings; arrests law violators; appears in court as a witness; assists other law enforcement agencies; gives directions to tourists; watches for and corrects or reports hazards to safe driving. He may administer drivers' license examinations or do other police work as required.

Qualifications Graduation from a standard senior high school or GED Certificate. Possession, upon appointment, of a valid Alabama driver's license. Each applicant must pass a physical examination equivalent to that established by the U. S. Army; must be at least 5 feet, 9 inches in height without shoes; minimum weight at least 160 pounds without clothing, other weights proportionate to height; must have sound teeth and vision correctible to 20/20, free from color blindness; must be at least 21 years of age by the date of examination but must not have reached his 36th birthday at the time of appointment; **must show on his application that he has never been convicted of a felony or a misdemeanor involving either force, violence, moral turpitude or serious traffic violations. NOTE!** A pattern of traffic violations such as reckless driving, speeding, failure to yield the right-of-way, etc., will constitute grounds for rejection from examination or removal from the eligible register. **All law violations of whatever nature must be reported, as all candidates will be fingerprinted and thoroughly investigated before being appointed.**

Kind of Exam Written Test.

SECURITY OFFICER 1 (7271) **Salary Range—$7,111 - $9,126**

Kind of Work This is routine security work in protecting state property and maintaining the security of state institutions. An employee in this class is responsible for patrolling a state institution to protect and guard property or persons from fire, theft, trespass or other hazards. He patrols a state mental institution, watches for fires, prowlers, vandalism, or other unusual occurrences; makes rounds of buildings and punches time clock periodically, or makes other reports as required; and performs related work as required.

Qualifications Graduation from a standard senior high school or GED equivalency. Possession of a valid Alabama driver's license. Freedom from physical defects, particularly in hearing, vision, or members to enable quick action and movement. Minimum height 5 feet, 2 inches, maximum height 6 feet, 10 inches; minimum weight 120 pounds, maximum weight 300 pounds at time of appointment, with height and weight in reasonable proportion. Minimum age 20½, maximum age 45 at time of appointment. Applicant must complete 240 hours of formal police training in a recognized police training school as defined by the Alabama Peace Officer's Standards and Training Act prior to the expiration of their probationary period.

Kind of Exam Written Test.

ATTACHMENT C

Caption of Request Omitted*

REQUEST FOR PRODUCTION

Come now the plaintiffs and request that Defendants Judson Locke and Stanley Frazer, produce and permit plaintiffs, through their undersigned counsel, to inspect and copy the following documents:

1. All written tests utilized for selecting persons for the position of (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer.

2. All literature, including written orders or directives, describing any physical testing procedure utilized in selecting persons for the position of (c) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer.

3. All literature describing the duties to be performed by (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer, including but not limited to the merit system job description.

4. All literature outlining the physical requirements for employment in the position of (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer.

5. All literature, including written orders or directives, which describe any physical testing which occurs after employment as a (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer.

Respectfully submitted,

JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES
1001 S. Hull Street
Montgomery, AL 36104
ATTORNEY FOR PLAINTIFFS

*Certificate of Service Omitted

Caption of Interrogatories Omitted*

INTERROGATORIES

Plaintiffs request that defendants Judson Locke and Stanley Frazer, or either of them, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following Interrogatories:

1. List every facility operated by the Board of Corrections wherein (a) Correctional Counselors, (b) Correctional Counselor Trainees, and/or (c) Correctional Officers are assigned and state that facilities' function.

2. Describe in detail the procedure and criteria utilized for selecting persons for the position of (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer.

3. List, by name, each person currently employed by the Board of Corrections in the position of (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer as of December 31, 1975, and provide the following information:

a. Sex
b. Present height
c. Present weight
d. Date of hiring
e. Weight as listed by the employee on his/her application for employment
f. Height as listed by the employee on his/her application for employment
g. Educational background
h. The facility to which the employee is assigned
i. The employee's specific job within the facility
j. Examination rating at the time of employment

4. If any tests of physical skills are utilized in the procedure described in 2 above, describe those tests.

5. Are periodic evaluations made of persons employed as (a) Correctional Counselors, (b) Correctional Counselor Trainees, or (c) Correctional Officers which involve physical testing.

6. If the answer to 5 is yes, describe the physical testing and state at what intervals such testing occurs.

7. List, by name, the sex, height, weight, and examination score of all persons currently on the eligibility list for certification as (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer.

Respectfully submitted,
JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES
1001 S. Hull Street
Montgomery, AL 36104
ATTORNEYS FOR PLAINTIFFS

* Certificate of Service Omitted

Caption of Answer to Interrogatories Omitted*

ANSWERS TO INTERROGATORIES

Comes now, Judson C. Locke, and for answer to the interrogatories propounded on February 3rd, says as follows:

1. The facilities operated by the Board of Corrections wherein (a) Correctional Counselors, (b) Correctional Counselor Trainees, and/or (c) Correctional Officers are assigned, and the functions of each facility are as follows:

A. *Draper Correctional Center.* A maximum security institution designed to accommodate adult male offenders in any custody classification and in any medical status.

B. *Frank Lee Youth Center.* A minimum security institution designed to accommodate youthful adult male offenders assigned minimum custody classification in regular or light duty medical status. Inmates assigned there must

be first felony offenders, under 24 years of age, and serving a sentence of 10 years or less.

C. *G.K. Fountain Correction Center.* A maximum security institution designed to accommodate adult male offenders in any custody classification in either regular or light duty medical status.

D. *Holman Prison.* A maximum security institution designed to accommodate adult male offenders in any custody classification or medical status. High security risk and severe management problem inmates are usually confined at this institution.

E. *Julia Tutwiler Prison.* A maximum security institution designed to accommodate adult female offenders in any custody classification or medical status.

F. *Kilby Corrections Facility.* A maximum security institution designed to accommodate adult male offenders in any custody classification or medical status. Kilby is also the Central Classification and Medical Facility of the Alabama Prison System.

G. *Number Four Honor Camp.* A minimum security institution designed to accommodate adult male offenders in minimum custody classification in regular duty medical status.

H. *Work Release Centers.* Minimum security institutions designed to accommodate adult offenders in a minimum custody classification in regular duty medical status. They are as follows:

(1) Birmingham Work Release
(2) Childersburg Work Release
(3) Mobile Work Release
(4) Atmore Work Release/Pre-release
(5) Draper Work Release
(6) Wetumpka Work Release
(7) Number Four Pre-release
(8) Alexander City Work Release

2. Procedure and criteria utilized for selecting persons for the position of (a) Correctional Counselor, (b) Correctional Counselor Trainee, and (c) Correctional Officer are as follows:

A. *Correctional Counselor Trainee.* When a position opens, the Board of Corrections requests a register from the State Personnel Office, and those on a continuing list are certified to the Board of Corrections. If the position is for one, three names are sent and if it is for more than one, one extra name is attached for each additional position.

To be placed on the list, applicants are graded on experience and education as stated in their application and must meet the physical and educational qualifications of the classification. (See Exhibit I)

Upon certification of the list to the Board of Corrections, a letter is sent to all those on the list and request is made for a reply as to whether they are available for the position. Upon reply to the letters, an appointment is made with the warden of the institution for an interview by the applicant.

Following all of the interviews, the decision of employment is made based upon qualifications and institutional needs.

Administrative Regulation Number 204 further allows for selective certification under certain circumstances (Exhibit "II").

B. *Correctional Counselor.* Correctional Counselor is a promotional rank from that of the Correctional Counselor Trainee. The requirements basically are completion of 240 hours at the police academy and 80 hours of training in the corrections field.

The rest of the program consists of on-the-job training at the institution where the Correctional Counselor will be employed, (Four and one-half months) where they become exposed to all facets of the correctional system at that insti-

tution.

Upon completion of this program, the person is certified to the State Personnel Board as completing the program and the State Personnel Board grades him; and, if eligible, he is promoted to Correctional Counselor.

3. See Exhibit "III".

4. Any tests of physical skills which are utilized in the procedure described in 2 above are as follows:

Every Correctional Counselor Trainee is required to take a physical examination before he is employed. See also Exhibit IV which is the basic Correctional Curriculum.

5. Yes.

6. Physical testing of Correctional Personnel is limited to a physical examination upon employment as well as other physical testing after employment, such as whether or not the officer is able to complete the police officers training course, and performance of his or her duties during and at the end of his or her probationary period.

7. See Exhibit "V".

Respectfully submitted,
WILLIAM J. BAXLEY
ATTORNEY GENERAL
LARRY R. NEWMAN
ASSISTANT ATTORNEY GENERAL
DAVID G. FLACK
ATTORNEY FOR BOARD OF CORRECTIONS
COUNSEL FOR DEFENDANTS

ADDRESS OF COUNSEL
250 Administrative Building
Montgomery, Alabama 36130

* Certificate of Service Omitted

EXHIBIT I

CORRECTIONAL COUNSELOR TRAINEE

DEFINITION

This is correctional work of a training nature in developing skills and techniques in the custody and rehabilitation of inmates in a State Correctional Institution.

An employee in this class participates in formal and on-the-job training courses to develop skills and techniques in the custody and rehabilitation of inmates in a State Correctional Institution. Work involves instructions in self-defense, use of firearms, law, and sociology applicable to inmates in confinement. Initial work assignments will be of a routine nature under direct supervision of a superior. Work is reviewed by supervisors through personal observation, inspections, and reports.

EXAMPLES OF WORK PERFORMED

Receives 240 hours of formal law enforcement training at one of the state police academies.

Participates in security and discipline of inmates during various activities within the institution.

Participates in searches and inspections of inmates and institutional grounds for violations of rules and regulations.

Assists and participates in the movement and supervision of inmates assigned to work in prison kitchens, shops, mills, laundries, or on farms.

Studies individual and group inmate behavior and control measures to avert physical harm to persons and property.

Assists in recapture of escaped prisoners.

Assists in counseling of inmates regarding personal problems, educational and vocational opportunities and work assignments.

Performs related work as required.

REQUIRED KNOWLEDGES, SKILLS, AND ABILITIES

Ability to develop skills in the care and use of firearms.

Ability to assimilate the purpose of the correctional program including discipline and rehabilitation of inmates.

Ability to develop skills to control, direct and counsel inmates individually and in groups.

Ability to understand and explicitly follow written and oral instructions.

Ability to remember names and faces.

Ability to meet special requirements of good reputation and character, emotional stability and freedom from physical defects.

QUALIFICATIONS

Graduation from a standard senior high school. (GED certificate acceptable).

NECESSARY SPECIAL REQUIREMENTS

Possession at time of appointment of a valid driver's license issued by the Alabama Department of Public Safety.

Physical examination at time of appointment.

Freedom from physical defects, particularly in hearing, vision, or members, to enable quick action and movement in the custody of inmates.

Minimum height 5 feet, 2 inches, maximum height 6 feet, 10 inches; minimum weight 120 pounds at time of appointment; maximum weight 300 pounds.

Minimum age 20½; maximum age 44½ at time of appointment.

Approved: 6/29/73

CORRECTIONAL COUNSELOR I

DEFINITION

This is routine penal work utilizing skills and techniques in custody and social rehabilitation of inmates in a state correctional institution.

Employees in this class have responsibility for the maintaining of order and discipline, the prevention of escape, and

the supervision of work activities of inmates. Employees perform beginning level advisory and counseling duties; counsel inmates in orientation and adjustment to institutional confinement, personal problems, educational and vocational opportunities and work assignments. Performs security at gates, wall towers, cell blocks, dining halls, and work areas inside and outside of prison walls. While assignments are generally of a routine nature, work is regulated by standing orders and is subject to constant supervision and inspection.

EXAMPLES OF WORK PERFORMED

Patrols prisons and prison yards; stands watch in halls, at gates, or in wall towers; makes regular reports to superiors.

Supervises and keeps order among prisoners assigned to work in prison kitchens, shops, mills, laundries, or on farms.

Enforces regulations covering sanitation and personal care.

Inspects all traffic into and out of prison proper.

Maintains constant watch for and reports unusual conditions or disturbances, keeps firearms in readiness for use if necessary; takes required action in emergencies to prevent escapes or suppress disorder; assists in recapture of escaped prisoners.

Explains to inmates, rules, procedures and services available at correctional institutions; counsels individual inmates regarding personal problems, educational and vocational opportunities and work assignments.

Evaluates inmate behavior and adjustment to a correctional environment; submits evaluation reports.

Instructs inmates in personal hygiene, discipline and proper etiquette.

Performs related work as required.

REQUIRED KNOWLEDGES, SKILLS, AND ABILITIES

Some knowledge of the psychological concepts of behavior, social adjustment, and emotional stability.

Some knowledge of modern principles of criminology and penology.

Some knowledge of modern principles and practices of counseling and psychology.

Skill in the care and use of firearms.

Ability to exercise mature judgment in the discipline and supervision of inmates.

Ability to control inmates individually and in groups.

Ability to remember names and faces.

Ability to act quickly and alertly in an emergency.

Ability to communicate effectively and to follow written and oral instructions.

QUALIFICATIONS

Any combination of training and experience equivalent to:

Graduation from a standard senior high school supplemented by satisfactory completion of 240 hours of police training at a recognized police training school.

NECESSARY SPECIAL REQUIREMENTS

Possession at time of appointment of a valid driver's license issued by the Alabama Department of Public Safety.

Approved: 6-29-73

CORRECTIONAL OFFICER

DEFINITION

This is routine penal work in maintaining the security and custody of inmates in a state prison.

Employees in this class have responsibility for the maintenance of order and discipline, the prevention of escape, and the supervision of work activities among prisoners on an assigned shift. Employees are assigned to gates, wall towers, cell blocks, dining halls, and work areas inside and outside prison walls. While assignments are generally of a routine nature, work is regulated by standing orders and is subject

to constant supervision and inspection.

EXAMPLES OF WORK PERFORMED

Patrols prisons and prison yards; stands watch in halls, at gates, or in wall towers; makes regular reports to superiors.

Supervises and keeps order among prisoners assigned to work in prison kitchens, shops, mills, laundries, or on farms.

Assists in feeding prisoners and enforcing regulations covering sanitation and personal care.

Takes periodic counts of prisoners in cell blocks or on work details.

Inspects all traffic into and out of prison proper.

Maintains constant watch for, and reports unusual conditions or disturbances; keeps firearms in readiness for use if necessary; takes required action in emergencies to prevent escapes or suppress disorder.

Assists in recapture of escaped prisoners.

Performs related work as required.

REQUIRED KNOWLEDGES, SKILLS, AND ABILITIES

Ability to exercise mature judgment in the discipline and supervision of persons under restraint.

Ability to control inmates individually and in groups.

Ability to remember names and faces.

Ability to act quickly and alertly in an emergency.

Ability to follow written and oral instructions.

Skill in the care and use of firearms.

QUALIFICATIONS

Any combination of training and experience equivalent to:

Graduation from the eighth school grade.

NECESSARY SPECIAL REQUIREMENTS

Possession at time of appointment of a valid driver's license issued by the Alabama Department of Public Safety.

Physical examination at time of appointment.

Freedom from physical defects, particularly in hearing,

vision, or members, to enable quick action and movement in the custody of inmates.

Minimum height 5 feet, 6 inches; minimum weight 130 pounds at time of appointment.

Minimum age 21, maximum age 55 at time of examination.

Revised: December, 1970

CORRECTIONAL OFFICER I (FEMALE)

DEFINITION

This is custodial and guidance work involving the custody, discipline, and rehabilitation of socially maladjusted women committed to the state women's prison.

Work involves responsibility for custody of female penal inmates and for instructing and supervising them in their daily work. Duties require the exercise of independent judgment in the conduct of work activities and an ability to maintain harmonious relationships under difficult circumstances. Employees are assigned to definite posts, and work is performed under close supervision and in accordance with established procedures and policies.

EXAMPLES OF WORK PERFORMED

Supervises inmates in cleaning, laundry, and general housekeeping duties such as making beds, dusting, and mopping.

Makes general inspections of prison units for sanitary conditions and execution of assigned tasks.

Observes the conduct, dress, manners, speech, and personal appearance of inmates and guides them in correcting or improving such characteristics.

Confers with prison authorities on difficult discipline problems.

Makes provision for inmates' food, clothing, and medical attention.

Supervises the preparation and serving of meals in a kitchen and dining room and instructs inmates in keeping the kitchen department clean.

Supervises the indoor and outdoor recreation of inmates.

Insures that inmates are locked in at night, that lights are out, and that inmates are in bed at proper time.

Supervises visits with inmates.

Supervises inmates in the care of grounds about the buildings.

Performs related work as required.

REQUIRED KNOWLEDGES, SKILLS, AND ABILITIES

Working knowledge of the methods, materials, and equipment used in institutional housekeeping.

Ability to enforce rules, regulations, and disciplinary measures with firmness and impartiality.

Ability to supervise a group of women inmates and secure their cooperation in the execution of assigned tasks.

Working knowledge of the methods and objects of discipline required for persons under restraint.

Ability to gain and hold the confidence of, and to maintain a sympathetic attitude toward, female criminal offenders.

Ability to act quickly in emergencies.

Freedom from serious physical defects and agility and physical strength to enable proper custody of inmates.

QUALIFICATIONS

Any combination of training and experience equivalent to:

Graduation from a standard senior high school.

Considerable experience in group work, some of which shall have been in a supervisory character.

NECESSARY SPECIAL REQUIREMENT

Minimum age limit: 23 years; maximum age, 51 years.

Revised: July 2, 1970

EXHIBIT II

STATE OF ALABAMA

BOARD OF CORRECTIONS

February 13, 1976

ADMINISTRATIVE REGULATION

NUMBER 204

Selective Certification

Correctional Counselor I Positions

I. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactory completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000C of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5. Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filled which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedures established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect the power of the Commissioner to hire or discharge any employee.

V. REFERENCES

12. Title 45-2000C, United States Code

13. Letter from the General Council of the Equal Employment Opportunity Commission.

J. C. Locke, Jr.
Commissioner

Annex A—(Same as No. 13)

Mr. J. C. Locke, Jr.
Commissioner
State of Alabama
Board of Corrections
Montgomery, Alabama 36104

Dear Commissioner Locke:

We have received your letter dated October 6, 1975 requesting an advisory opinion with regard to hiring only female correctional counselor trainees to work in all-female prisons, and only male correctional counselor trainees to work in all male prisons.

We have noted in your letter that you are being funded by the Law Enforcement Assistance Administration (LEAA) to hire and provide training for correctional counselor trainees; that male correctional counselor trainees who are employed at all-female prisons are in non-contact slots (outergate and tower), and female correctional counselor trainees

who are employed at all-male prisons are in non-contact slots (outergate and tower); that the job at issue calls for frequent inspection and patrol of restrooms and showers thereby invading the privacy of prisoners, and would place female employees in all-male prisons in danger of sexual or other attack due to sexual deprivation; that no firearms are carried by correctional counselors or security personnel; and that there is a low ratio of security personnel to inmates.

Please note that this letter is not an opinion letter pursuant to 29 C.F.R. §1601.30.

Section 703(e) of Title VII of the Civil Rights Act of 1969, as amended, 42 U.S.C. 2000e-2(e), states as follows:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise. . . .

The regulation at 29 C.F.R. §1604.2, 37 F.R. 6836 (April 5, 1972) states as follows:

> (a) The Commission believes that the bona fide occupational exception as to sex should be interpreted narrowly. Labels — 'men's jobs' and 'women's jobs' — tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characteristics of the sexes . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

Many courts have interpreted the statute and regulations dealing with sex discrimination and the B.F.O.Q. exception.

Relevant Case Law

In cases analagous to the one at issue, courts have held that employers may rely upon the B.F.O.Q. exception in order to employ or to assign like-sexed employees to work with inmates in correctional institutions.

There are several cases which you should examine which are helpful in the analysis of the question you raise.

In *Long v. State Personnel Board*, Calif. Ct. App. 116, No. Cal. Rptr. 562 (1974), 8 EPD Para. 9745, the court held that under Title VII,[1] there was no sex discrimination, due to application of the B.F.O.Q. exception, where the state refused to hire a female chaplain to work at an all male youth correctional institution. The Court said that generally there are three overall interests to consider: plaintiff's interest, the wards' interest and the public interest. The Court considered the safety problem for the female chaplain who would be counselling, frequently, quite far away from male employees, youths whose average age was 19½ and whose physical control could not be guaranteed. The Court also considered the element of privacy of the inmates who lived in various

[1] The Court also found no violation under the Federal or State constitutions.

states of undress in their dormitories where the chaplain would be expected to be from time to time. Also see *City of Philadelphia v. Pennsylvania Human Relations Commission* 7 Pa. Commonwealth 500, 300 A2d 97 (1973), 5 EPD Para. 8538, where the Court held that under a state law where the definition of B.F.O.Q. was intended to be the same as the one under Title VII, the state must grant the City of Philadelphia a B.F.O.Q. exception for youth center supervisor jobs, allowing the city to hire only like sexed supervisors for single sexed youth correctional institutions. In this case, although the Court discussed and was concerned about danger to employees and the privacy of the inmates it was also concerned about the age of the inmates and their special counselling and privacy needs.

In *Reynolds v. Wise*, 375 F.Supp. 147 (N.D. Texas 1974) 8 EPD Para. 9778, the Court held that a female employee at a state correctional institution for adult males had to be returned to her job in the mail room which had previously been filled by a man who was given a rotation every six months, which rotation involved counselling and other contact with the inmates. The female was to be given these extra assignments when returned to her previous mail room job in order to prepare her for promotions, but the Court also noted the following:

> Selective work responsibilities among correctional officers excluding from the duties of women assignment to dormitories or shake-down is reasonable to insure privacy of inmates and does not discriminate against women. *Reynolds v. Wise, supra* at 151.

In those cases discussing correctional work done outside an institutional setting, the Courts examine the nature of the work. In *Button v. Rockefeller*, 6 EPD Para. 8835, (N.Y. Sup. Ct. Sept. 10, 1973) a case brought under the New York Executive Law Section 296, the Court held that the State's

hiring of four women as state troopers whose scores were below the scores of a male applicant, was not discriminatory because women were needed in order to search other women and do undercover work. On the other hand, the Court in *Tracey v. Oklahoma, Dept. of Corrections*, 8 EPD Para. 9713 (W.D. Okl. May 23, 1974) found that there was nothing in the nature of the jobs as probation or parole officers which would justify using separate hiring lists. The Court found that these jobs did not fit within the B.F.O.Q. exception.

Although not concerning correctional officers, also of relevance to the question you raise is the case of *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3rd Cir. 1973) 5 EPD Para. 8434, *cert. denied* 414 U.S. 866 (1973), 6 EPD Para. 8861, wherein one question was whether or not the Equal Pay Act was applicable in a situation where sex-segregated job classifications were permissible as a B.F.O.Q. The Appellate Court noted the finding by the District Court that there was a valid reason for having a sex segregated sales force, which was "the frequent necessity for physical contact between the sales persons and the customers which would embarrass both and would inhibit sales unless they were of the same sex." *Hodgson v. Robert Hall Clothes, Inc., supra* at 592 citing District Court opinion at page 1269.[2]

Conclusion And Recommendations

The statute, regulations and cases under Title VII suggest that you carefully evaluate each assignment in order to determine whether the B.F.O.Q. exception would apply. Some guidelines for you to consider when making your determination are as follows: the public interest and the interest of

[2] But see **Cianciolo t/a Galaxy Massage Parlor v. Members of City Council, Knoxville, Tennessee** 376 F.Supp. 719 (E.D. Tenn. 1974), 8 EPD Para. 9708 where the Court found that the city ordinance prohibiting bisexual massages was in conflict with Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2.

employees in minimizing danger, and the interest of the inmates in their own personal privacy. It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions. Wherever possible, these employees should be given the opportunity to perform their work with the state's firm guidance on curtailment of assignments which endanger the employees, the public and/or invade the personal privacy of the inmates. Since counselling should be stressed in order to upgrade the jobs involved, it is suggested that you can provide areas where employees and inmates can benefit from this part of the work, without regard to the sex of the employee or inmate.

If you need further information in the future, please do not hesitate to write again or to call.

Sincerely,
Abner W. Sibal
General Counsel

EXHIBIT III

CO - Correctional Officer CC- Correctional Counselor CCT - Correctional Counselor Trainee

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	Education
Jessie E. Bowdoin	CC I	#4 Honor Camp	9/11/74	78.8	M	5'81/2"	180	HSGrad
Ocie F. Dennis	CO	"	1/11/56		M	5'9"	155	8th
William F. Gray	CO	"	7/23/63		M	5'11"	170	10th
McArthur Harvey	CCT	"	11/20/75	77.43	M	6'1"	215	1yr.Col
Edwin L. Henry	CC I	"	8/14/74	83.64	M	6'5"	205	BachDeg
Wayne Justiss	CC I	"	6/28/72	78.90	M	6'0"	160	HSGrad.
Horace C. Moore	CC I	"	9/19/73	75.00	M	6'2"	200	HSGrad/
Roy L. Pilgrim	CO	"	4/12/72		M	5'11"	165	10th
Jodie L. Pilgrim	CO	"	2/14/75		M	5'10"	190	8th
James H. Bettis	CO	ChildersburgW.R.	2/13/74		M	6'0"	235	11th
Bobby W. Bowling	CC I	"	4/2/74	70.00	M	5'4"	150	HSGrad
John B. Camp	CC I	"	10/9/74	71.88	M	5'9"	190	HSGrad
Howard A. Daniels	CCT	"	10/16/75	87.68	M	6'3"	185	3yrCol
Marie Heath	CC I	"	3/27/74	73.81	F	5'7"	160	BusTra
Rita T. Ingram	CC I	"	12/18/74	72.51	F	5'3"	123	GED
Hershel L. McCain	CO	"	2/6/74		M	5'9"	215	9th
Larry M. Britton	CC I	Alex City P.R.	9/4/74	75.00	M	5'8"	170	HSGrad
Mark A. Frank	CC I	"	9/25/74	74.07	M	5'10"	201	3yrCol
Earnest L. Harrelson	CC I	"	8/28/74	71.17	M	5'10"	230	1yrCol
Randal L. Lucas	CC I	"	9/11/74	70.00	M	5'9"	185	HSGrad
Thomas E. Martin	CC I	"	11/20/74	75.00	M	5'10"	195	HSGrad
Robin F. Reynolds	CC I	"	9/25/74	71.53	M	5'11"	177	1½yrCol
Charles H. Simmons	CCT	"	9/15/75	83.64	M	5'11"	160	B.A.
Opal A. Harden	CO IF	"	4/12/72		F	5'7"	165	11th
Annie K. Holt	CC I	"	10/9/74	78.13	F	5'7"	125	3yrCol
Phillips, Ida M.	CO IF	"	5/26/71		F	5'2"	165	HSGrad
Robbins Betty Jo	CC I	"	9/13/72	80.76	F	5'4"	165	HSGrad
Stewart Cynthia R.	CC I	"	5/27/74	74.76	F	5'5"	130	3yrcol
Clayton Joyce A.	CCT	Montg.W.R.	7/30/75	78.64	F	5'6"	134	B.A.
Johnson Aldean	CCT	"	12/17/75	83.64	M	6'2"	210	B.A.
Johnson Lee E.	CCT	"	7/30/75	79.58	M	5'11"	165	B.A.
McCurdy Gwendolyn	CCT	"	12/3/75	78.64	F	5'4"	120	B.A.
Parrish Kathy M.	CCT	"	12/3/75	78.64	F	5'7"	130	B.A.
Potts Eugene D.	CCT	"	12/10/73	88.37	M	5'11"	195	HSGrad
Tolbert Peggy A.	CCT	"	10/22/75	78.64	F	5'2"	150	B.A.
Carr Wendell H.	CCT	Atmore P.R.	2/12/75	78.64	M	6'0"	205	B.A.
Weaver Ronald L.	CC I	"	10/16/73	70.81	M	5'8½"	155	HSGrad
Williams Clifford F.	CC I	"	8/2/71	72.39	M	5'11"	200	HSGrad
Witherspoon Mary L.	CCT	"	4/2/75	78.84	F	5'7"	200	B.A.
~~Benjamin James L.~~	~~CO~~	~~CETA~~	~~11/14/75~~		~~M~~			HSGrad
Cloud Richard	CO	"	11/5/75		M			HSGrad

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.
~~Easterling Oscar R.~~	~~CO~~	~~CETA~~	~~12/9/75~~		~~M~~	~~6'4"~~	~~285~~	10th
Garrett R.E.	CO	"	10/20/75		M	5'6"	154	6th
Haynes Richard C.	CO	"	11/3/75		M	5'3"	162	10th
Holt Ivan	CO	"	10/30/75		M			HSD
Hopper Donald R.	CO	"	9/25/75		M	5'11"	234	HSD
Parker Ralph	CO	"	10/6/75		M	5'9"	163	9th
Richardson James C.	CO	"	12/15/75		M	5'7"	184	11th
Smith Willie C. Jr.	CO	"	11/25/75		M			HSD
Spellman Patrick	CO	"	10/8/75		M			HSD
Williams Hilton O.	CO	"	10/15/75		M	6'3"	200	GED
Worthey Paul E.	CO	"	10/20/75		M	5'11½"	183	HSD
Aldridge Wilbur	CO	Kilby C.F.	9/23/59		M	5'11"	198	9th
Allen Carlin	CO	"	7/23/73		M	5'6"	175	HSD
Anderson Darcy L.	CO	"	2/16/73		M	6'0"	225	9th
Averette James W.	CCT	"	3/7/66	100.00	M	6'0"	175	HSD
Baker Ray T.	CC I	"	5/22/74	91.00	M	5'11"	185	4yrCol
Bennette Robert L.	CC I	"	7/10/74	70.61	M	6'0"	230	HSD
Best Hillery V.	CO	"	4/19/52		M	5'11"	155	7th
Blankenship James L.	CO	"	10/26/72		M	5'8"	190	8th
Bone Samuel J.	CO	"	2/16/58		M	5'10"	160	8th
Bowdoin Herbert R.	CC I	"	6/18/74	78.58	M	6'1"	180	GED
Braswell Willie	CC I	"	9/16/74	78.64	M	6'4"	240	B.A.
Bragg Lee	CO	"	2/1/74		M	5'7"	150	11th
Bruce Sylverster J.	CC I	"	4/1/74	70.00	M	5'11"	165	HSD
Bush John M.	CO	"	4/29/53		M	5'11"	168	7th
Colley Floyd C.	CO	"	7/2/57		M	5'11"	158	8th
Davidson William J.	CO	"	3/8/50		M	6'2"	142	9th
Dawson Eugene	CO	"	10/24/72		M	5'9"	180	HSD
Donald Willard L.	CO	"	8/30/72		M	6'1"	202	HSD
Forbish Leo R.	CO	"	6/18/74		M	5'6"	180	HSD
Fulmer Bernard O.	CO	"	2/16/61		M	5'8"	198	11th
Gantt Jimmy Lee Jr.	CC I	"	10/17/74	74.58	M	5'7"	150	B.A.
Gates James E.	CO	"	3/18/74		M	6'1"	240	HSD
Graves Milton III	CC I	"	8/28/73	86.59	M	5'7"	140	3yrCol
Hall Clarence Jr.	CC I	"	10/17/74	80.25	M	5'10"	188	HSD
Hamm Lester E.	CC I	"	1/5/76	76.53	M	5'10½"	170	HSD
Hebert Dewey	CCT	"	12/9/70	84.47	M	5'7"	150	HSD
Helms Edd Lee	CO	"	3/4/54		M	5'9"	185	7th
Howard Robert J.	CO	"	4/2/74		M	5'9"	150	HSD
Hubbard William J.	CO	"	10/17/73		M	5'8"	140	9th
Huey Samuel R.	CC I	"	1/16/74	79.58	M	5'11"	175	B.A.

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.
Johnson Marion T.	CO	KilbyC.F.	1/20/69		M	5'8½"	175	HSD
Jones Benny O.	CO	"	10/10/73		M	5'8"	165	3yrCol
Jordan Matt D.	CC I	"	3/26/74	75.40	M	5'8"	185	HSD
Knighton Harry L.	CO	"	9/2/70		M	6'2"	200	HSD
Lewis Amos Jr.	CC I	"	8/27/73	75.91	M	6'1"	175	HSD
Major Emmett O.	CC I	"	10/24/73	78.64	M	5'10"	145	B.A.
Malone Arthur C. Jr.	CO	"	6/26/72	88.33	M	5'9"	167	11th
Maxwell Roosevelt	CC I	"	6/6/73	75.61	M	5'5½"	148	HSD
McAllister Michael F.	CC I	"	4/12/73	81.33	M	5'9½"	204	HSD
Miller Dorothy D.	CC I	"	9/13/74	78.99	F	5'4"	130	B.A.
Mitman Truman W.	CO	"	11/11/70		M	5'11"	148	HSD
Moncrief Maurice W.	CO	"	4/6/72		M	5'10"	165	Bus.Tr.w/oHS
Moseley Raymond M.	CCT	"	12/27/71	78.56	M	5'10"	150	HSD
Noles William G.	CO	"	7/13/72		M	5'11"	160	11th
Norrell Reuben A.	CO	"	9/4/64		M	5'10½"	180	11th
Patterson Dewey H.	CO	"	11/9/71		M	5'10"	195	8th
Reid Alvah W.	CC I	"	2/10/75	79.98	M	5'7"	150	2yrCol
Ronoke Eddie L.	CO	"	3/28/74		M	6'0"	186	HSD
Sanford Robert L.	CC I	"	2/19/74	83.33	M	5'8"	210	HSD
Shumaker Billie S.	CO	"	6/23/59		M	6'2"	205	HSD
Smith Eugene	CC I	"	9/19/74	78.64	M	5'4"	145	B.A.
Smith Hardwick	CO	"	10/17/73		M	5'10½	190	HSD
Smith Albert J.	CO	"	2/12/73		M	6'2"	210	HSD
Taunton Jimmie W.	CC I	"	2/13/73		M	5'11"	175	GED
Waid Pinkney A.	CO	"	7/2/57		M	6'0"	230	BusTrnw/oHSD
Ward Robert Lee	CC I	"	1/13/61	84.15	M	5'9"	160	HSD
Webster James O.	CC I	"	10/10/75	77.64	M	6'0"	160	HSD
Williams Ernest R.	CCT	"	7/14/75	87.67	M	6'5½"	160	B.A.
Wright Grady	CO	"	11/24/53		M	5'9½"	150	7th
Aughtman Lester C.	CCT	G.K.FountainCC	9/30/74	71.02	M	5'11"	140	GED
Baggett Travis S.	CO	"	10/7/65		M	6'0"	185	HSD
Baggett Roy A.	CO	"	10/1/69		M	6'1"	165	HSD
Ballard Elbert J.	CO	"	8/17/61		M	5'10"	190	11th
Barlow Vernon E.	CC I	"	2/20/74	70.00	M	6'0"	210	HSD
Bell Leonard H.	CO	"	10/29/69		M	6'3"	227	10th
Bilbo Charlos L.	CCT	"	10/17/75	75.45	M	5'6"	140	1yrCol
Blanton William O.	CO	"	11/2/71		M	5'8"	155	11th
Bodiford Charlie E.	CC I	"	2/7/73	76.02	M	5'7"	140	HSD
Bragg Robert C.	CO	"	8/13/70		M	5'11"	190	8th
Brown Isaac N.	CC I	"	10/16/68	83.09	M	5'11"	190	HSD
Brothers Grady E.	CO	"	9/7/65		M	5'11"	194	HSD

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.
Bryars Oddie	CO	G.K.FountainCC	2/25/74		M	5'6"	170	11th
Calhoun Norman C.	CO	"	4/27/71		M	5'8"	130	8th
Cannon Billy H.	CO	"	10/25/72		M	6'2"	265	HSD
Carlton Tommy D.	CC I	"	12/17/73	70.36	M	5'8"	152	GED
Carver James E.	CC I	"	10/29/69	79.89	M	6'1"	200	HSD
Carlee Joseph M.	CO	"	3/1/66	70.43	M	6'0"	200	10th
Caraway Edward E.	CO	"	10/15/73		M	5'11½"	215	10th
Caraway Collin L.	CO	"	7/1/69		M	5'11"	180	8th
Caraway James T.	CO	"	10/19/73		M	6'0"	185	9th
Coffey Ladd L.	CC I	"	6/12/64	86.15	M	6'2"	174	2yrCol
Crawford Andrew F.	CCT	"	10/8/75	76.32	M	5'8"	180	2yrCol
Dandra William J.	CCT	"	6/7/72	72.89	M	5'8"	145	GED
Daughtry Adam	CO	"	7/17/73		M	5'9"	150	9th
Davis Larry V.	CCT	"	9/24/75	70.40	M	5'9"	220	GED
Donaldson Clifford J.	CO	"	2/15/73		M	5'11"	155	10th
Dorriety Billie H.	CC I	"	4/6/73	70.51	M	6'0"	200	HSD
Dorriety Jerry W.	CCT	"	8/14/74	72.43	M	6'3"	190	9th
Downey John R.	CO	"	12/13/66		M	5'9"	155	8th
Downey T.C.	CO	"	10/29/69		M	5'10"	185	8th
Dreadin Arthur C.	CO	"	9/17/71		M	6'0"	190	10th
Ellis Bennie L.	CO	"	11/13/72		M	5'10"	170	8th
Elloitt I.V.	CO	"	9/6/68		M	5'9"	175	HSD
English Jessie L.	CO	"	5/4/54		M	6'0'	134	7th
English Hugo	CO	"	4/28/69		M	6'0"	192	10th
Etheridge Bruce C.	CO	"	11/10/53		M	5'11"	225	7th
Fowler Willie R.	CO	"	3/24/67		M	5'11"	172	9th
Godwin Alton	CO	"	8/27/75		M	5'6½"	160	8th
Gregg Euby	CO	"	4/4/60		M	5'11"	170	11th
Griffin Bill	CO	"	10/21/70		M	5'8"	185	GED
Hall Charles M.	CO	"	8/27/75		M	5'10"	188	10th
Hall Willie F.	CO	"	11/10/72		M	6'2"	230	11th
Hall Jack	CO	"	8/27/75		M	6'3"	162	8th
Hammack Julian O.	CCT	"	3/12/75	76.17	M	5'10"	200	HSD
Harrison William T.	CO	"	11/30/73		M	6'1"	195	9th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	EDUCATION
Hayes Hayward	CC I	G.K. FountainCC	12/17/69	80.24	M	6'1"	185	HSD
Haynie Luke	CC I	"	5/5/71	79.42	M	5'11"	197	GED
Hines Glen	CO	"	7/15/70		M	6'0"	165	8th
Hinson L C	CO	"	5/3/71		M	5'10"	225	8th
Holdaway Jack M	CO	"	6/1/69		M	5'9"	180	8th
Jackson Gordon	CC I	"	2/20/74	72.15	M	5'11"	225	2yrCol
Johnson Erbie S	CC I	"	10/7/65	82.88	M	6'1"	180	HSD
Johnson Katie M	CCT	"	3/26/75	78.64	F	5'6"	143	B.A.
Johnson Aubrey	CO	"	7/30/73		M	5'8"	175	8th
Jones Woodrow W	CC I	"	1/27/66	77.88	M	6'0"	215	9th
King Donald E	CCT	"	6/1/73	71.93	M	5'10"	160	GED
Knight Harvey	CCT	"	10'14'75	75.00	M	5'8"	150	HSD
Knowles Delmas R	CO	"	6/1/62		M	5'10"	183	HSD
Lane Otto	CO	"	4/8/59		M	5'8"	190	8th
Leatherwood Douglas	CC I	"	2/9/72	77.64	M	5'10"	153	HSD
Lee Robert	CO	"	5/8/74		M	5'9"	135	8th
Mabry Philip T	CCT	"	11/10/75	72.69	M	5'11"	175	Bus.Tr.w/HSD
Mancil Herbert W	CO	"	10/3/73		M	5'10"	180	HSD
McKinley Geo Washto	CO	"	8/10/61		M	5'10"	190	10th
McKinney James E	CCT	"	5/27/74	71.37	M	6'1"	230	GED
Mosley James L	CC I	"	12/31/69	79.32	M	5'6"	175	HSD
Nelson Luther M	CCT	"	11/8/74	75.91	M	6'2"	210	GED
Oswald Hayward J	CO	"	10/1/69		M	5'5"	155	9th
Owens Walter T	CO	"	1/29/73		M	5'9"	180	8th
Phillips Charles W	CO	"	12/3/69		M	5'8"	140	10th
Quimby Walter B	CO	"	11/1/66		M	5'10"	185	1yrCol
Ray James E Jr.	CC I	"	8/16/72	76.53	M	6'0"	200	HSD
Redmon Bertha L	CC I	"	3/11/73	70.00	F	5'7"	147	GED
Richardson Eddie	CC I	"	10/9/74	80.83	M	6'1"	225	B.A.
Roberts L Junior	CO	"	11/10/54		M	5'8"	145	11th
Ross Albert J	CO	"	8/1/63		M	5'10"	182	HSD
Salter Charles W	CO	"	12/10/73		M	5'10"	165	GED
Shipp James V	CO	"	10/7/71		M	5'9¼"	155	8th
Shipp James E	CO	"	11/7/72		M	5'11"	145	HSD
Smith Charles B Jr	CCT	"	10/20/75	75.00	M	5'11"	155	HSD
Smith Chester	CO	"	6/9/69		M	5'8"	200	8th
Smith Chesley	CO	"	4/5/71		M	5'6"	195	HSD
Smith Carl	CO	"	8/27/75		M	5'8"	147	10th
Smith Roy H	CO	"	1/22/74		M	5'9"	160	9th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	
Springs Brenda	CCT	G.K.Fountain	12/10/75	78.64	F	5' 8''	145	N.A.
Taylor Donald L	CCT	"	12/29/75	71.58	M	5'9"	153	1 yr Col
Timothy James c	CO	"	10/01/69		M	5'7"	180	9th
Timothy Andrew E	CO	"	07/09/73		M	5'6"	180	10th
Turk James	CO	"	08/13/63		M	6'0"	244	HSGrad
Ward William D	CCT	"	12/08/75	81.19	M	5'11"	155	M.S.
Watford Alton C	CO	"	08/01/69		M			
Williams Albert F	CC I	"	10/01/66	79.73	M	5'10"	180	G.E.D.
Wilson Bibb H	CCT	"	07/16/75	75.00	M	5'10"	175	HSD
Williams Albert E	CC I	"	12/04/74	70.40	M	5'11"	160	HSD
Willson Dudley W	CO	"	07/16/67		M	5'9"	285	8th
Womack Ralph	CO	"	09/04/53		M	5'9"	140	8th
Achimon Archie U	CO	Draper	12/01/63		M	5'8"	175	HSD
Barrett Cloyce E	CO	"	08/24/61		M	5'10"	167	HSD
Barrett Clyde A	CO	"	09/10/68		M	5'8"	138	HSD
Bedford Leo Wm	CC I	"	09/09/63	84.15	M	6'0"	164	GED
Bibb Robert	CC I	"	03/27/72	77.67	M	5'6"	155	HSD
Blankenship John	CO	"	09/23/68		M	5'9"	185	10th
Boyer Jim Henery	CO	"	07/16/69		M	5'7"	150	HSD
Campbell James W	CO	"	11/29/72		M	5'8"	145	8th
Carr James L	CO	"	06/23/71		M	5'8"	155	9th
Checkler Horace R	CO	"	01/19/72		M	5'11"	190	11th
Cline Don C	CC I	"	02/14/73	90.33	M	6'1"	235	GED
Collins Lloyd	CC I	"	10/17/73	82.60	M	5'6"	176	1yr Coll
Colquitt Henry	CO	"	06/30/72		M	5'9"	170	10th
Colley Harvey Allen	CO	"	03/07/63		M	6'½"	217	HSD
Conner Warren L	CO	"	03/04/69		M	6'0"	157	6th
Dennis Joe F	CCT	"	11/03/75	78.66	M	5'8"	185	HSD
Daniels Leeposey	CCT	"	06/11/75	78.64	M	6'0''	164	BA
Devaughn Joseph L	CO	"	02/16/67		M	5'8"	209	9th
Devaughn Hardy	CO	"	09/29/75		M	6'1"	195	11th
Dillinger Bert E	CC I	"	04/17/74	77.95	M	6'0"	145	HSD
Driver James E	CO	"	09/03/74		M	5'10"	156	HSD
Easterling Rufus T	CO	"	07/16/68		M	6'5"	280	8th
Edwards Floyd	CCT	"	08/22/66	78.05	M	5'9''	178	HSD
Eiland Marion	CO	"	08/24/72		M	5'6"	160	9th
Elliott John J	CO	"	09/30/74		M	6'2"	200	GED

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.
Faulk Billy	CO	Draper	11/05/74		M	5'11"	170	10th
Frost DONald	CCT	"	06/18/75	93.11	M	5'10 "	195	BA
Fuller Joseph W	CO	"	11/04/74		M	6'0"	222	11th
Garmon Jewel L	CO	"	08/07/57		M	6'3 "	182	9th
Geoghegan Claude	CC I	"	10/01/74	75.71	M	5'6"	175	HSD
Gibbons Halfmann	CO	"	01/18/72		M	5'11"	180	11th
Glenn James H	CCT	"	11/16/71	83.00	M	5'8"	170	HSD
Gray Richard R	CO	"	09/19/61		M	5'11"	206	11th
Hayes Fred L	CC I	"	10/09/74	75.00	M	6'0"	210	HSD
Herrod John W	CO	"	05/24/71		M	5'8"	165	HSD
Holman Joe C	CO	"	09/18/72		M	5'8"	162	10th
Horsley George W	CO	"	04/17/72		M	6'0"	250	10th
Hughes Richard M	CC I	"	06/14/74	75.37	M	5'11"	165	3yr Coll
Johnson Eddie	CC I	"	02/01/74	75.10	M	5'9"	168	HSD
Jones Doris	CC I	"	10/30/73	78.14	F	5'8"	190	HSD
Jones James Carl	CC I	"	08/24/64	79.10	M	5'9"	168	HSD
Kirland Bobby	CO	"	10/01/75		M	6'0"	195	1yr COll
Little Herman	CO	"	08/08/67		M	5'11"	151	10th
Littlejohn James W	CO	"	02/02/57		M	6'2"	190	9th
Lowman James C	CC I	"	12/17/73	93.33	M	5'8"	145	3yr Coll
McDonnald Edward	CC I	"	10/09/74	75.00	M	5'7"	138	GED
McGee Henrietta E	CCT	"	07/21/75	79.40	F	5'5"	142	BA
McGowin James D	CO	"	02/23/72		M	5'6"	140	HSD
Mitchell EDward	CO	"	10/18/59		M	6'2"	155	HSD
Murchison Beno L	CO	"	01/09/61		M	5'11"	160	HSD
Murchison Leonard O	CO	"	09/18/68		M	5'11"	150	11th
Noah Thomas	CO	"	3/22/66		M	5'8"	170	8th
Noah James	CO	"	9/21/67		M	5'11"	199	11th
Osteen Henry L.	CO	"	8/1/63		M	5'10"	152	10th
Owens Charles H.	CO	"	12/20/66		M	5'8"	172	10th
Parker Roger K.	CC I	"	12/4/72	70.86	M	6'0"	157	HSD
Plyler Barnes S.	CO	"	5/4/67		M	5'11"	223	HSD
Randall Charles T.	CO	"	3/12/73		M	6'1½"	168	10th
Rich Everett L.	CC I	"	10/6/66	76.71	M	6'0"	190	GED
Robinson Theodore	CO	"	7/18/53		M	5'7"	165	8th
Roper Clemmie C.	CC I	"	12/3/73	75.00	M	5'11"	163	HSD
Russell Raymond E.	CC I	"	6/19/74	75.00	M	5'10"	157	GED
Sansom David E.	CO	"	10/24/73		M	5'8"	155	11th
Scroggins John B.	CO	"	10/24/73		M	5'7"	150	HSD
Simmons Clester H.	CO	"	4/24/68		M	6'4"	254	10th
Smith Hollis L.	CC I	"	11/28/73	70.36	M	5'7"	160	HSD
Smith James H.	CO	"	6/19/69		M	6'1"	235	12th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.
Stearns Arvel C.	CO	Draper	3/18/63		M	6'0"	194	10th
Steadham James F.	CO	"	5/14/74		M	6'0"	175	BusTrHSD
Thornell Max	CC I	"	6/15/72	82.73	M	5'11"	176	GED
Thompson Robert C.	CC I	"	10/18/73	74.78	M	6'2"	225	HSD
Walker Murray L.	CO	"	7/15/70	85.29	M	6'2"	230	HSD
Walker Leon G.	CO	"	12/6/52		M	5'8"	165	7th
Ward Jerremah	CO	"	4/16/63		M	5'11"	150	11th
Watkins James C.	CO	"	9/26/75		M	5'7"	185	12th
Wells Johnny E.	CCT	"	3/28/66		M	5'8"	198	9th
Whitt Ethelrine P.	CO	"	7/21/75	78.64	F	5'8'	146	B.A.
White Marion R.	CO	"	2/20/68		M	5'11"	170	10th
Wiggs Joe Jr.	CC I	"	11/24/64		M	5'11"	170	10th
Wilson Ernest T.	CO	"	2/28/73	80.24	M	5'9"	175	B.S.
Wilson Randall G.	CO	"	10/1/75		M	5'10"	160	HSD
Wright William A.	CO	"	6/12/67		M	5'11"	151	10th
Wright Ralph W.	CO	"	1/2/69		M	5'9"	174	6th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	Ed
Blankenship, Pauline C.	CO	Tutwiler	01-21-70		F	5'0"	140	8th
Brown, Essie D.	CC I	Tutwiler	10-26-73	79.41	F	5'5"	135	Bach. D.
Cobb, Virginia K.	CO	Tutwiler	07-18-73		F	5'6"	120	HSD
Collier, Mary Sewell	CCT	Tutwiler	10-16-72	81.19	F	5'6"	135	1 yr col
Davis, Barbara J.	CCT	Tutwiler	09-03-75	81.39	F	5'5"	145	Med.
Duke, Benjamin C.	CO	Tutwiler	08-01-57		M	5'8"	160	8th
Estes, John R.	CO	Tutwiler	11-03-72		M	6'0"	175	HSD
Gassett, Allen L.	CC I	Tutwiler	09-16-63	79.15	M	5'7"	180	HS Grad
Gassett, Montez L.	CO	Tutwiler	08-16-63		F	5'6"	180	HS Grad
Goodman Eunice Hila	CC I	Tutwiler	09-10-59	79.40	F	5'7"	155	HS grad
Gorce, Merla E.	CC I	Tutwiler	02-11-55	79.40	F	5'8"	130	HSD
Hill, Harvey H., Jr.	CCT	Tutwiler	05-07-75	80.00	M	6'4"	212	HSD
Hollyfield, Helen	CC I	Tutwiler	02-12-74	70.00	F	5'5"	142	HSD
Holt, Mary C.	CO	Tutwiler	08-16-63		F	5'4"	130	11th
Holley, Arlene T.	CO	Tutwiler	10-16-63		F	5'11"	130	12th
Jefferson, Ethel R.	CCT	Tutwiler	01-29-75	78.64	F	5'5"	134	Bach. D.
Lee, Claudine	CCT	Tutwiler	01-02-75	78.64	F	5'6"	120	Bach D/
Matthews, Virginia	CCT	Tutwiler	07-16-63	79.15	F	5'3½"	115	HSD
Morrison, Sa rah	CO	Tutwiler	12-30-54		F			HSD
Murchison, Katherine	CO	Tutwiler	03-24-67		F	5'2"	130	HSD
Rawlinson, Florence F.	CO	Tutwiler	09-16-66		F	5'7"	155	HSD
Ross, Gladys I	CO	Tutwiler	11-10-71		F	5'4"	150	10th
Stepp, Joyce C	CCT	Tutwiler	07-02-75	81.19	F	5'5"	170	H.S. D.
Vinson, Brenetta Y.	CC I	Tutwiler	11-07-73	78.64	F	5'5"	134-	Bach D.
Wood, Mary Lee	CO	Tutwiler	06-16-67		F	5'1"	143	HSD
Wood, Adolphe L.	CO	Tutwiler	04-13-72		M	5'7"	200	10th
Baugh, James E.	CO	Holman	06-06-72		M	5'8"	130	8th
Biles, Lester V.	CCT	Holman	11-07-75	75.76	M	5'8"	160	HSD
Blackburn, William C.	CO	Holman	10-23-69		M	5'11"	190	10th
Blackmon W.D.	CO	Holman	05-07-74		M	5'7"	150	8th
Boone, Henry C.	CO	Holman	06-06-74		M	6'2"	270	10th
Boutwell, Raymond	CCT	Holman	12-05-75	70.37	M	6'0"	205	HSD
Boyd, Martha A.	CCT	Holman	03-27-75	74.58	F	5'8"	127	12th
Branch, Willie	CO	Holman	09-21-72		M	6'3"	183	10th
Brooks, Fred	CO	Holman	08-13-70		M	5'10"	195	6th
Bryars, Chester	CO	Holman	03-26-73		M	5'7"	170	8th
Carrol, Marshall	CCT	Holman	07-26-74	80.80	M	6'3"	180	HSD
Coleman, Charles H.	CCT	Holman	05-24-75	73.69	M	6'0"	200	HSD
Coleman, John D.	CO	Holman	05-13-70		M	5'8"	187	8th
Coleman, Joseph R.	CO	Holman	07-30-75		M	5'6"	135	8th
Cruthfiled, James B.	CO	Holman	05-18-70		M	5'10"	230	11th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION - Ed.
Cruit, Riley M.	CO	Holman	03-00-74		M	6'0"	136 10th
Davidson, Lavaughn	CCT	Holman	11-06-75	72.18	M	6'1"	210 GED
Davis, Jerry M.	CO	Holman	02-12-75		M	5'11"	155 8th
Dean, Stephen L.	CC I	Holman	07-31-74	70.55	M	5'10"	215 HSD
Digmon, Richard G.	CC I	Holman	06-25-74	76.68	M	5'8"	162 1 yr col
Dixon, Ira L.	CO	Holman	08-00-73		M	6'	170 8th
Dunn, Joe	CO	Holman	05-18-70		M	5'10"	165 8th
Dyross, Donnie F.	CCT	Holman	01-21-71	74.22	M	5'11"	264 HS Grad
Ellis, James T.	CO	Holman	09-02-69		M	6'	190 8th
English, Bobby R.	CO	Holman	07-26-73		M	5'7"	160 HSD
Floyd, James C.	CO	Holman	09-09-74		M	6'2"	190 8th
Flowers, Julius J.	CO	Holman	01-24-75		M	6'2"	170 8th
Foster, Donnie	CO	Holman	02-15-74		M	5'11"	165 9th
Fralick, Thomas J.	CO	Holman	01-04-72		M	5'11"	210 11th
Gibbs, Willie E.	CO	Holman	06-29-73		M	5'5"	135 10th
Grant, Elmore V.	CO	Holman	05-13-70		M	5'8"	130 10th
Hank, Homer L.	CCT	Holman	02-26-73	78.54	M	5'9"	140 HSD
Harville, Norman	CO	Holman	11-12073		M	5'10"	170 8th
Hayes, Bryan	CCT	Holman	11-25-75	72.59	M	6'2"	205 1 yr col
Hixon, William T	CCT	Holman	12-17-69	75.02	M	6'2"	185 GED
Hodgen, James R.	CC I	Holman	09-12-73	75.25	M	5'7"	162 GED
Holt, Isaac J.	CC I	Holman	02-04-72	75.67	M	6'0"	210 HS GRad
Hollinger, Dennie C.	CO	Holman	09-17-71		M	6'0"	204 10th
Johnson, Larry D.	CCT	Holman	03-05-74	70.76	M	6'0"	153 GED
Jones, Robert D.	CCT	Holman	12-22-75	75.00	M	5'8"	130 Less than 1 yr cd
Kirby, David B.	CCT	Holman	12-29-75	71.12	M	6'0"	295 GED
King, Earl D.	CO	Holman	05-16-68		M	6'3"	175 10th
Kitzinger, Ronald W.	CCT	Holman	07-21-75	75.00	M	5'8"	160 GED
Lee, Roy J.	CO	Holman	03-20-68		M	6'0"	165 8th grad
Luker, Ingram	CO	Holman	05-13-70		M	5'9"	150 8th
Mason, Marvin W. Jr.	CO	Holman	11-06-74		M	5'11'	145 9th
McAnally, Earl	CO	Holman	01-22-74		M	6'0"	200 11th
Messick, Gaines W.	CO	Holman	09-06-74		M	5'9"	200 11th
Moore, Elizabeth	CC I	Holman	01-30-74	70.20	F	5'5"	122 HS Grad
Oswald, James R.	CO	Holman	01-25-73		M	5'10"	133 9th
Overstreet, Calvin W.	CO	Holman	08-13-70		M	6'2"	180 10th
Parker, Leroy	CO	Holman	11-06-74		M	6'0"	135 8th
Payne, Dewey E.	CC I	Holman	04-20-72	81.04	M	6'2"	225 GED
Peacock, Clarence A.	CO	Holman	09-26-73		M	5'11"	203 HS Grad
Pugh, John H.	CO	Holman	03-02-73		M	5'7"	170 8th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.
Qualls Juby J.	CO	Holman Prison	6/6/72		M	6'2"	190	8th
Quimby Kenneth R.	CO	"	7/1/74		M	5'9"	225	HSD
Raines Jessie H.	CCT	"	2/20/73	73.15	M	6'0"	185	GED
Raines Joseph C.	CC I	"	9/13/72	78.00	M	5'11"	200	HSD
Rollin William	CC I	"	2/22/74	70.00	M	5'6"	175	GED
Ryals Charles W.	CO	"	4/11/63		M	5'8"	181	10th
Seale Otha	CO	"	12/6/71		M	5'9"	180	HSD
Seale Leon	CO	"	7/7/72		M	5'11"	190	10th
Sellers Edward L.	CO	"	4/29/74		M	6'2"	210	8th
Sirmon Richard I.	CO	"	5/29/74		M	6'2"	165	10th
Smith James M.	CO	"	5/18/70		M	5'7"	135	9th
Stabler Frank W.	CO	"	11/12/74		M	5'11"	180	8th
Stewart William W.	CCT	"	12/31/69	80.49	M	5'9"	147	GED
Steele Henry R. Jr.	CO	"	4/17/74		M	5'9"	180	8th
Taylor Kindle M.	CC I	"	2/3/71		M	5'11"	190	HSD
Tolbert Harry T.	CO	"	12/4/72		M	6'1"	185	8th
Tolbert Leroy	CO	"	2/11/70		M	5'9"	147	8th
Welch Mack O.	CCT	"	10/9/75	75.00	M	5'11½"	168	HSD
Whatley William P.	CO	"	11/14/73		M	5'11"	175	GED
White George L.	CO	"	7/2/73		M	5'8"	135	8th
Wiggins Elbert R.	CC I	"	10/12/71	73.56	M	6'0"	152	B.A.
Wright Terry T.	CC I	"	3/26/73	74.53	M	6'1"	170	HSD
Carter Mary C.	CC I	B'ham.P.R.	1/29/75	78.84	F	5'3"	127	B.A.
Ceaphus Leslie C. Jr.	CC I	"	7/11/73	84.80	M	5'11"	175	1yrCol
Dewitt Robert H.	CCT	"	12/17/75	89.22	M	6'5"	245	Masters
Everhart Charles E.	CC I	"	10/19/73	77.85	M	5'10"	177	2yrCol
Harding Nancy C.	CC I	"	9/17/73	70.00	F	5'5"	130	HSD
Hightower Royzell	CC I	"	11/12/73	77.64	M	5'5"	140	1yrCol
Jordan John C.	CC I	"	4/4/73	78.10	M	6'0"	190	2yrCol
Bryars Edith M.	CC I	MobileP.R.	1/30/74	78.64	F	5'9½"	170	B.A.
Ellisor Thomas M. Jr.	CC I	"	1/16/74	92.03	M	5'11"	201	Masters
Evans Donald J.	CC I	"	10/9/74	81.10	M	5'9"	195	3yrCol
McGill John C.	CC I	"	1/30/74	73.66	M	5'10"	190	2yrCol
Ruffin Barbara A.	CC I	"	2/13/74	74.83	M	5'2"	123	B.A.
Thomas Ernest Jr.	CC I	"	3/13/74	78.15	M	5'10½"	168	HSD
Bray Jessie S.	CCT	Frank LeeYC	1/15/75	77.53	M	5'8"	130	D.A.
Daniels Olivia	CCT	"	7/30/75	78.64	F	5'3"	129	B.A.
Dowdy Cheril A.	CC I	"	10/24/73	78.64	F	5'11"	160	B.A.
Foreman James W.	CO	"	7/1/67	81.25	M	5'11"	190	10th
Harris Richar M.	CC I	"	1/14/72	82.00	M	5'7"	160	GED
Neeley Sidney E.	CO	"	10/29/69		M	5'7"	170	GED
Smith Leonard E.	CO	"	2/15/68		M	5'11"	170	8th
Smith Carl B.	CO	"	5/23/73		M	6'0"	180	10th

EXHIBIT IV

240 Hrs. CORRECTIONAL CURRICULUM

1. General Orientation — 2 hours
   Includes opening remarks/course syllabus.

2. Notebook construction and notetaking procedures. — 1 hour
   When constructed properly the materials can be used as a Correctional Counselor handbook for future reference.

3. Pre-Test — 1 hour
   Test designed to measure present level of skills and knowledge. Later to be used as an evaluation tool.

4. Corrections as a profession. — 2 hours
   Scope of vocations within the Alabama Correctional System designed to illuminate the interrelated objectives for the common goal of rehabilitation.
   Brief history of the Correctional Officer.

5. Public Relations — 2 hours
   Includes policies concerning the news media and a broad scope of community relations.

6. Vocational Guidance familiarization for the Correctional Counselor — 10 hours
   The Correctional Counselor should be able to assist the inmate in making appropriate vocational choices.
   Brief overview of the process of testing for skills, aptitudes and interests.

7. Education — 5 hours
   The function of education in the rehabilitation of inmates. Basic literacy courses, high school completion, trade and technical skill courses, colleges level and other formalized study and work programs which provide opportunities for self development and trade skill development.

8. Inmate Behavior and the sociology of the Penal Institution — 20 hours
   Many different things go into the making of the inmate such as physical characteristics, mental abilities, past experiences and personality traits. The loss of family and friends, the loss of personal possessions, the loss of freedom, the regimented life - all these and others affect the inmate. The Correctional Counselor is responsible for the security, discipline of inmates and is a vital part of the rehabilitation program. To perform these duties in the most effective manner, it is necessary for him to understand the people with whom he deals.

9. Correctional Counseling — 40 hours
This course incorporates the necessary Interpersonal Communication Skills Training, patterned from the Carkhuff model of counseling that will train Correctional personnel in a manner that would assist the inmate to solve some of his problems and add to his skills in coping with society. This includes a discussion of the three basic goals of (1) Exploration, (2) Understanding, and (3) Action.

10. Psychology of Behavior/Modification techniques for the Correctional Counselor — 10 hours
Behavioral terminology to include practice with overt and covert behavioral descriptions. Reinforcement and shaping techniques.

11. Alcohol and Drug Abuse — 8 hours
Identification of the abused drugs in the penal institution. The physical and psychological effects of alcohol and drug abuse. A discussion of the correlation between alcohol and drug abuse and crime.

12. Officer/Inmate Relationship — 10 hours
To help the officer perform his important role in the correctional system, it will be beneficial to examine the history of officer/inmate relationships and how they have developed from the earliest prisons to today's modern correctional system; the types of officer/inmate relationships and how they affect the officer's performance of duty; what inmates respect in officers, including what actions cause them to cooperate and what they rebel against; and some of the problems in officer/inmate relationships which should be avoided if the officer is to be effective.

13. Handling the Emotionally Disturbed — 4 hours
A comprehensive discussion of emotional disorders.

14. Security, Custody and Control — 16 hours
Methods of security within a penal institution. Definitions of security, custody and control.

15. Collection, Preservation and Identification of Evidence for Investigative Purposes — 4 hours
The Correctional Counselor needs to be able to objectively investigate a crime witin a penal system.

16. Search and Seizure/Transport of Prisoners — 4 hours
Legal aspects and consideration for search and seizure.

17. Written Communication — 8 hours
To familiarize the trainees with the essentials of good report writing, the characteristics, the format and style. Objective writing for disciplinary actions.

18. First Aid — 8 hours
Techniques of emergency first aid for the Correctional Counselor. Multi-media instruction for the Red Cross Certification.

19. Institutional Hygiene — 8 hours
Certain deficiencies in living and working quarters may directly or indirectly affect the health of the inmates. Modern housekeeping is fast becoming a science requiring skilled procedures for efficient results.

20. Inmate/Prisoner Rights — 5 hours
A comprehensive study of constitutional rights for prisoners.

21. Legal Complaints and Disciplinaries — 10 hours
Legal considerations and procedures concerning writs. The legal aspects of disciplinary hearings for major and minor violations - Administrative Regulations 403 and 404.

22. Defensive Tactics — 16 hours
Techniques of hand-to-hand defensive tactics.

23. The Use of the Baton — 20 hours
Proper use of the baton can be an effective control technique and save lives of inmates and Correctional Counselors.

24. Firearms Familiarization and Qualification — 24 hours
Techniques of instruction to include the basic principles of marksmanship training for shotgun and pistol firing.

25. Mid Test & Final Test — 2 hours

COURSE DESCRIPTION

I. INTRODUCTION TO LAW ENFORCEMENT 4

1. Opening Remarks and Orientation 1

Official opening of the class followed by a descriptive explanation of the course and subject objectives. Rules governing student activities during the course, and methods of work evaluation will be outlined.

2. Development of Law Enforcement 2

Acquaint the student with historical development of law enforcement.

3. Explanation of Alabama Peace Officers Standards and Training Commission Act #1981 and amending Act # 156 1

Familiarize the student with the Act and its purpose.

II. GENERAL TOPICS 41

1. Notebook Construction and Notetaking 1

Instruct the student in proper methods of constructing the basic student notebook and preparing notes.

2. Law Enforcement as a Profession 1

Encourage the student to think and perform the duty of law enforcement in a professional manner.

3. Loyalty and Morale 2

Explain to the students the importance of being loyal to the agency and effect that this loyalty will have upon the morale of others.

4. Internal Security 2

Instruct the student in the purposes, duties, and scope of the Internal Security.

5. Introduction to Cooperative Services of Federal,State, and Local Law Enforcement 1

Acquaint the student with the services provided by all agencies and to foster a harmonious relationship between them.

6. Federal Law Enforcement Agencies 2

Acquaint the students with various Federal Law Enforcement Agencies, their functions and how they may help local law enforcement.

7. ABC Laws 1

Acquaint students with the Alabama law pertaining to the control of alcoholic beverages and liquor.

8. State Parole Offices 1

Acquaint student of the purpose and function of the parole system of the state of Alabama.

9. Telephone Burglary and Obscene Calls 2

Instruct students on necessary action to take in the event of burglary of pay telephone boxes. To instruct the student in immediate and followup action to take in the event of obscene telephone calls.

10. Communications (Radio) 1

Explain to the students the basic procedure for operation of a base station two-way radio and a mobile unit.

11. Records Section 2

Acquaint the student with function and importance of records keeping.

12. Federal Firearms and Untaxed Whiskey Laws 4

Explain Federal Firearms Act and to acquaint the students with recognition of untaxed whiskey, the dangers of and penalties for making, possessing, receiving or selling untaxed whiskey.

13. Explosives ACt of 1971 1

Instruct the student on why, how, and when the Explosive Act of 1971 can be used.

14. Recognition of Bombs and Explosive Devices 6

Familiarize the student with different types of bombs and explosives used by militant or subversive groups. Explain procedure and precautionary measures to be taken when these bombs or explosive devices are found.

15. Handling the Emotionally Disturbed — 6

Teach the students how to recognize emotionally disturbed persons and to offer suggestions on methods of handling these persons including interviews, arrests, and referrals.

16. First Aid — 8

Instruct students in the Standard First Aid Course.

III. EQUIPMENT — 14

1. Care and Use of Equipment — 2

Stress the importance of caring for police equipment and to teach methods of proper use.

2. Use of Emergency Equipment, Escorts & Relays — 1

Instruct the student in what constitutes "emergency equipment" when and how this equipment may be used, who has authority to administer emergency runs, and how they are to be conducted.

3. Operation of Police Vehicles — 3

Stress the importance of safe operation of police vehicles to include preventative maintenance. To teach proper methods of operation of police equipment.

4. Defensive Driving — 8

Teach the students a standard course in defensive driving, designed by the National Safety Council.

IV. CRIMINAL INVESTIGATION — 36

1. Receiving and Handling Complaints — 3

Teach the student the importance of properly handling complaints from citizens. To discuss the many different types of complaints encountered by law enforcement officers.

2. Preserving the Crime Scene — 1

Instruct the student in proper technique of preserving the crime scene.

3. Crime Scene Search and Charting Crime Scene — 4

Instruct the student with proper and effective methods of searching crime scenes and producing desired results. To teach proper charting of crime scene.

4. Building Searches — 2

Instruct the student in the method of building search, the systematic search in detail, and use of K-9 in building search.

5. Collection and Preservation of Evidence. — 3

Instruct the student in proper method of identifying and collecting and preserving evidence found at the scene of crime.

6. Fingerprint-Theory — 4

Acquaint the student with the history of fingerprints and generalized information as to their classification. To have students participate in actual fingerprinting each other and practice developing latent prints.

7. Burglary Investigation — 2

Instruct the student in the methods and types of burglary investigations and detection of burglary suspects.

8. Identification of Stolen Automobiles — 2

Teach the proper techniques in identifying and recovering stolen automobiles.

9. Vice and Narcotics Operation — 8

To acquaint the student with types of vice and drugs and narcotics, drug identification, and techniques of investigating such offenses.

10. Sex Crimes — 4

Instruct the student in the different types of sex crimes they may encounter. To teach the proper methods used in preventing such offenses. Explain the different modus operandi of sex criminal. Psychology terms.

11. U.S. Attorney's Office, Evidence, Searches and Seizures, Civil Rights — 2

Acquaint the student with their views on handling evidence, civil rights, searches and seizures, as affective by Supreme Court decisions and cooperation of this office with local law enforcement.

12. Criminal History Files — 1

Explain the laws regarding criminal history registration, mug files, and explain their value.

V. CRIMINAL PROCEDURES & LAWS OF EVIDENCE 17

1. Mechanics and Techniques of Arrest 4

Instruct student in the many different techniques and procedures of making a legal arrest. Discuss laws of arrest.

2. Searching Prisoners 1

Instruct students in proper method of searching person, and what to search other than the person.

3. Transporting Prisoners 1

Teach proper method of restricting, handling, and transporting prisoners.

4. Jail Procedures 1

Acquaint students with duties and responsibilities of jail operation, booking of prisoners, control of firearms, and relinquishment of control of prisoners.

5. Interrogation and Confessions 4

Instruct the student in the lawful techniques to be used in an interrogation; acquaint with laws and court decisions pertaining to confessions, admissions, and declarations.

6. Polygraph 2

Acquaint student with the polygraph and how it can assist in investigation.

7. Rules of Evidence 4

Teach necessity of having legal evidence. To discuss the ways and means of obtaining admissible evidence.

VI. JUVENILE PROCEDURES 15

1. Juvenile Laws State of Alabama 3

Acquaint students with Alabama law relating to juveniles.

2. Juvenile Interviews 2

Acquaint students with the rights of and the methods of interviewing juveniles.

3. Sex Crimes Against Juveniles 1

Acquaint students with particular sex crimes most often perpetrated against juveniles and types of persons who generally commit these offenses.

4. Family Courts and Juvenile Courts 4

Inform students of laws relating to Juvenile Court procedure. Responsibility of parents. The significance of preventing delinquency. To acquaint students with methods and procedures for youth and family counseling.

5. Work with Juveniles 5

Acquaint students with programs designed to work with pre-delinquent and delinquent youth. Explain function and scope of Juvenile Programs.

II. COURTS 24

1. Alabama Code of Alabama, Volume 5, Titles 14 and 15 8

Acquaint the student with Alabama law on crimes and offenses and criminal procedure.

2. Case Preparation 4

Instruct the student in procedure for preparing a case for trial before the Grand Jury or Court, to include report writing.

3. Court Procedure-Testifying 8

Instruct the student in preparation for testimony, demeanor on stand, appearance in court, reaction of cross-examining attorney and pointers on police testimony. Explain judicial structure. Moot trial.

4. Supreme Court Decisions 4

Make students aware of recent Supreme Court decisions and to explain how they affect the job of enforcement.

III. PATROL TECHNIQUES 6

1. Patrol Techniques 6

Instruct in the duty and responsibility of the law enforcement officer in patrol techniques and to project the best known methods of fulfilling these responsibilities.

IX. TRAFFIC OPERATIONS — 46

1. Officer-Violator Contact — 4

Impress upon the student the importance of officer-violator contact. To teach the proper methods of contact, particularly in traffic law enforcement. To instruct in proper technique of stopping and interviewing violators. To instruct in proper procedure in writing traffic citation. Officers self-protection.

2. Traffic Direction and Control — 3

Instruct the students in uniform signals and gestures, and the need for same.

3. Speed Timing Devices — 1

Acquaint the student with the purpose of speed timing devices. To familiarize the students with these devices, their operation and recording of data obtained.

4. Introduction to Accident Investigation — 1

Introduce the students to accident investigation and explain why we investigate traffic accidents.

5. Planning the Investigation — 2

Teach the students to plan ahead as far as they can, and to extend the plan as more information is received. To teach them the stages of planning accident investigations.

6. Keeping the Accident from Getting Worse — 1

Acquaint the students with suggested actions which have proved effective in keeping the accident from getting worse than at the time the officers arrive.

7. Traffic Accidents and Their Causes — 3

Teach the students the causes of traffic accident investigations. This includes contributing factors, operations, etc.

8. Road and Weather Conditions — 1

Acquaint the students with the importance of weather and road conditions in traffic hazards.

9. Vehicle Conditions — 1

Teach what the vehicle shows about why the accident happened. To discuss illegal conditions discovered in accident investigation problems of investigation, and the parts of the vehicle likely to contribute to accidents.

10. Recording Data/Uniform Accident Report — 4

Instruct the students in how and what to record the facts uncovered in the investigation. This includes accident forms and supplemental information so the facts will always be available.

11. Skidmarks-Classroom — 5

Create awareness of the potential use of skidmark evidence. To identify types and forms of skidmarks and their meaning and the technique of proper identification and measurement. Includes practical exercise in calculating minimum speed from skidmarks using the monograph and formulas.

12. Measurements and Diagrams-Classroom — 4

Measurements and Diagrams-Field — 4

Discuss the needs for accurate measurements as part of the data gathering process. Discuss the techniques to be used in accurately locating pertinent data(vehicle, objects, debris, etc.) as it applies to the accident situation. Also includes a practical exercise.

13. Critique and Discussion of Skidmarks, Measurements and Diagrams — 2

Inform the student on their effects in plotting skidmarks, measurements, diagrams.

14. Implied Consent Law — 3

Teach the students how and why the implied consent law was inacted and how it should be applied to DWI arrests.

15. Intoximeter Procedure — 1

Acquaint the students with the intoximeter and demonstrate its operation. Also, to impress upon them that they make their case before the subject is tested on the device, and that it substantiates the case already made.

16. Safety REsponsibility Laws — 2

Instruct the students to inform the drivers in accidents as to the safety responsibility laws and the forms to be used.

17. Hit and Run Accidents — 2

Discuss a sequence of actions to be taken and the essential phases of this type of investigation as well as the kinds of information deemed important in the follow-up investigation of an accident. Alert the student to the kinds of technical assistance available.

18. Review and Examination of Accident Investigation Course 2

Inform the student on their strengths and weaknesses in the area of accident investigation.

X. OFFENSIVE/DEFENSIVE TACTICS 4

1. Use of Baton-Defensive Tactics 4

Instruct the student in proper use of baton as a defensive weapon to include basic riot control formations.

XI. COMMUNITY/PUBLIC RELATIONS 12

1. Public Relations 2

Acquaint students with the need of an adequate Public Relations Program and point up need of effective interaction between the citizen and the officer.

2. News Media/Law Enforcement 1

Instruct the student in services that news media can render. Discuss cooperation between news media and the agency.

3. Community Relations 4

Discuss the need and functions of a Community Relations Program, bridging gap between community and law enforcement.

4. Extremist Groups and Targets 5

Acquaint the student with the different names of extremist groups in the U.S..and specifically in Alabama. Names of leaders, known followers, goals, objectives, methods of operation.

XII. FIREARMS 8

1. Firearms 8

Acquaint the student with mechanics of weapons used in law enforcement. To instruct in proper handling of weapon and basic safety of weapons. To instruct in and actual firing of Combat Pistol Course.

XIII. EXAMINATIONS & DIRECTORS TIME 13

1. Evaluation, Seminar, Testing, and Review 12

Two hours each Friday to be used at Directors discretion.

2. Graduation 1

EXHIBIT V

STATE OF ALABAMA PERSONNEL DEPARTMENT

REQUEST FOR CERTIFICATION OF ELIGIBLES

1. Department: Board of Corrections	2. Division:	3. Position number(s):
4. Classification: Correctional Counselor I	5. Location of assignment: Frank Lee, Kilby, Holman, Fountain	6. Number of vacancies to be filled: 6
7. Is this work (X) Permanent? ( ) Temporary - 164 work days or less? ( ) Part-time?		
8. Name of previous incumbent, if any	9. Reason for leaving service	10. Date position(s) vacant

11. Describe the exact nature of the work to be performed. (Attach Form 68 if this is a new position)

Promote done

There are not enough applications received from Correctional Course or 12-8-76

12. Signed: Appointing authority 0408 — 13. Date:

14. CERTIFICATION: Correctional Counselor I — REGISTER: PROMOTIONAL — Entrance Salary: 336.50

Name	Examination	Exam. Rating	Vet. Pref.	Total	Sex	Effective Date of Appointment: Height	Weight	Loc.
Carr, Vendall H. ✓	Eligible 16 years	79.02	0	79.02	M	6'0"	220	ATTICA Pre-Release
Hanks, Homer L. ✓	12 years	78.54		78.54	M	5'7"	140	Holman
Williams, Ernest R. ✓	16 years	77.68	0	77.68	M	6'0½"	162	Kilby
Bray, Jessie S. ✓	16 years	77.53	0	77.53	F	5'8"	130	FLYC
Sutherspoon, Mary L. ✓	16 years	77.09	0	77.09	F	5'7"	280	ATTICA Pre-Release
Macmack, Jo O. ✓	12 years	73.24	0	73.24	M	5'11"	220	Fountain

Certified: [signature] — Date: 1-20-76 — Certification No.: — 1-23-76

Personnel Director — Appointing Authority

INSTRUCTIONS: This certificate, signed by the appointing authority, should be returned to the Personnel Department within 10 days accompanied by all forms and papers of those certified, including correspondence with those who declined and copies of letters to those who failed to reply.

Selection to fill each vacancy must be made from the three highest ranking eligibles disregarding those who failed to answer or those who refused appointment.

The Merit System Act requires that an appointing authority who passes over the name of an eligible veteran and selects a non-veteran must file with the Personnel Director the reasons for so doing. Indicate the action taken in the appropriate column as follows.

A -- Appointed
B -- Declined offer of Appointment.
C -- Considered but not selected
FR - Failed to reply
VA -- Wrong Address

Form 15 (Rev. 8-66)

STATE OF ALABAMA - PERSONNEL DEPARTMENT

REQUEST FOR CERTIFICATION OF ELIGIBLES

1. Department	2. Division	3. Position number(s)
4. Classification	5. Location of assignment	6. Number of vacancies to be filled
7. Is this work ( ) Permanent? ( ) Temporary - 104 work days or less? ( ) Part-time?		
8. Name of previous incumbent, if any	9. Reason for leaving service	10. Date position(s) vacant

11. Describe the exact nature of the work to be performed. (Attach Form 48 if this is a new position)

12. Signed: Appointing Authority		13. Date
14. CERTIFICATION	REGISTER	Entrance Salary

Name	Exam. Rating	Vet. Pref.	Total	Action	Effective Date of Employment	SEX	HEIGHT	WEIGHT
Holt, Ivan V. ✓	75.24	0	75.24			M	5'11"	170
Culberson, Harvey S. ✓	73.19	0	73.19			M	6'2"	230
Hardley, Jim, Jr. ✓	70.15	5	75.15			M	5'11"	174
Hanley, William W. ✓	70.10	5	75.10			M	5'9"	200
Black, Carolyn P. ?	75.09	0	75.09			F	5'3" (illegible)	125
Alexander, Bobby ✓	70.03	5	75.03			M	5'8½"	170

Certified: Personnel Director	Date: 2-3-76	Certification R: Appointing Authority

INSTRUCTIONS: This certificate, signed by the appointing authority, should be returned to the Personnel Department within 10 days accompanied by all forms and papers of those certified, including correspondence with those who declined and copies of letters to those who failed to reply.

Selection to fill each vacancy must be made from the three highest ranking eligibles disregarding those who failed to answer or those who refused appointment.

The Merit System Act requires that an appointing authority who passes over the name of an eligible veteran and selects a non-veteran must file with the Personnel Director the reasons for so doing. Indicate the action taken in the appropriate column as follows.

A -- Appointed
B -- Declined offer of Appointment
C -- Considered but not selected
FR - Failed to reply
VA -- Wrong Address

STATE OF ALABAMA - PERSONNEL DEPARTMENT

REQUEST FOR CERTIFICATION OF ELIGIBLES

1. Department: Board of Corrections	2. Division: Dept. of Classification & Treatment	3. Position number(s)
4. Classification: Correctional Counselor Trainee	5. Location of assignment: Atmore, Ala. Holman Correctional Facility	6. Number of vacancies to be filled: 50
7. Is this work (x) Permanent? ( ) Temporary - 104 work days or less? ( ) Part-time?		
8. Name of previous incumbent, if any	9. Reason for leaving service	10. Date position(s) vacant

11. Describe the exact nature of the work to be performed. (Attach Form 48 if this is a new position)

12. Signed: W. F. Blackwell Appointing Authority		13. Date: 2/3/76
14. CERTIFICATION: Corr. Counselor Trainee - 4404	REGISTER: Corr. Counselor Trainee	Entrance Salary: 273.30

Name	Exam. Rating	Vet. Pref.	Total	Action	Effective Date of Employment	SEX	HEIGHT	WEIGHT
Carr, William W. ✓	80.06	5	85.06			M	6'4"	190
McClaney, Tommie L. ✓	83.37	0	83.37			M	6'4"	175
Core, Delmar E. ✓	72.08	10	82.08			M	5'7"	170
Cook, Robert W., Jr. ✓	74.58	5	79.58			M	6'1"	180
Jansen, David E., Jr. ✓	74.42	5	79.42			M	5'9"	180
Campbell, Lovegene ✓	79.30	0	79.30			M	6'7"	200
Coley, Jerome ✓	73.91	5	78.91			M	6'1"	168
Creswell, Carolyn ✓	78.75	0	78.75			F	5'7"	140
Cousins, Stephanie D. ✓	78.64	0	78.64			F	5'4"	120
Creech, Charlotte J. ✓	78.64	0	78.64			F	5'4"	140
Culp, Joe H. ✓	72.69	5	77.69			M	6'4"	180
Hudson, Jodie H. ✓	77.12	0	77.12			F	5'5½"	180
Webb, Xelvin E. ✓	72.03	5	77.03			M	5'11"	190
Reid, Alberta Y. ?	76.76	0	76.76					
Dix, Octavia ✓	76.76	0	76.76			F	5'3"	189
Grady, Chester L. ✓	76.76	0	76.76			M	5'8"	182
Carlock, Allison L. ✓	76.71	0	76.71			M	5'4"	170
Giles, Jesse, Jr. ✓	76.45	0	76.45			M	6'½"	220
Mitchell, Wendell B. ✓	71.42	5	76.42			M	6'3"	205
Willis, George H. ✓	71.37	5	76.37			M	6'10"	180
Cassett, Montes L. ✓	76.30	0	76.30			F	5'5½"	178
Dunn, Willie A. ✓	76.30	0	76.30			M	5'11"	167
Jenkins, Larry W. ✓	71.27	5	76.27			M	5'6"	190

Certified: Personnel Director	Date: 2-3-76	Certification: Appointing Authority

INSTRUCTIONS: This certificate, signed by the appointing authority, should be returned to the Personnel Department within 10 days accompanied by all forms and papers of those certified, including correspondence with those who declined and copies of letters to those who failed to reply.

Selection to fill each vacancy must be made from the three highest ranking eligibles disregarding those who failed to answer or those who refused appointment.

The Merit System Act requires that an appointing authority who passes over the name of an eligible veteran and selects a non-veteran must file with the Personnel Director the reasons for so doing. Indicate the action taken in the appropriate column as follows.

A -- Appointed
B -- Declined offer of Appointment
C -- Considered but not selected
FR - Failed to reply
VA -- Wrong Address

Form 15 (Rev. 8-66)

STATE OF ALABAMA - PERSONNEL DEPARTMENT

REQUEST FOR CERTIFICATION OF ELIGIBLES

Department | 2. Division | 3. Position Number(s)

4. Classification | 5. Location of Assignment | 6. Number of vacancies to be filled

7. Is this work ( ) Permanent? ( ) Temporary - 100 work days or less? ( ) Part-time?

8. Name of previous incumbent, if any | 9. Reason for leaving service | 10. Date position(s) vacant

11. Describe the exact nature of the work to be performed. (Attach Form 40 if this is a new position)

12. Signed Appointing Authority | 13. Date

14. CERTIFICATION | REGISTER | Entrance Salary

Name	Exam. Rating	Vet. Pref.	Total	Action	Effective Date of Employment	Height	Weight
Cole, Thomas L.	71.27	5	76.27			6'0"	190
Stubbs, Thomas C.	71.27	5	76.27			5'9½"	175
Strutt, Sandra Rae	76.20	0	76.20			5'5"	148
Pride, Carl, Jr.	76.20	0	76.20			5'11"	220
McCormick, Henry W.	71.17	5	76.17			5'11"	220
Watkins, James C.	71.17	5	76.17			6'1"	190
Eaton, Cliff	76.15	0	76.15			5'7"	170
Rooks, Eddie L.	71.12	5	76.12			6'0"	212
Blankenship, Paulina	76.10	0	76.10			5'0"	118
Eiland, Stephen A.	76.10	0	76.10			5'0"	140
Lewis, Deborah P.	76.10	0	76.10			5'7"	118
Jones, Stephen J.	76.10	0	76.10			5'8"	138
Newton, James F.	76.10	0	76.10			6'2"	178
Worthey, Paul E.	71.02	5	76.02			5'11½"	190
Kelley, Shirley V.	75.95	0	75.95			6'1"	190
Ainsworth, Thomas William	70.66	5	75.66			5'6"	138
Rushing, Ronnie C.	70.66	5	75.66			6'2"	208
Howard, Robert James	70.16	5	75.61			5'10½"	230
Yates, Frank E., Jr.	75.59	0	75.59			5'6"	148
Spencer, Andrea D.	75.59	0	75.59			5'4½"	130
Milam, Lawrence B.	70.51	5	75.51			6'0"	175
Forbish, Leo Richard	70.35	5	75.35			5'6"	197
Grover, William S.	70.30	5	75.30			6'0"	210

Certified: [signature] | Date: 2-5-76 | Certification #

Personnel Director | Appointing Authority

INSTRUCTIONS: This certificate, signed by the appointing authority, should be returned to the Personnel Department within 10 days accompanied by all forms and papers of those certified, including correspondence with those who declined and copies of letters to those who failed to reply.

Selection to fill each vacancy must be made from the three highest ranking eligibles disregarding those who failed to answer or those who refused appointment.

The Veterans Preference Act requires that an appointing authority who passes over the name of an eligible veteran and selects a non-veteran must file with the Personnel Director the reasons for so doing. Indicate the action taken in the appropriate column as follows.

A -- Appointed
C -- Considered but not selected
D -- Declined offer of Appointment
FR - Failed to reply
WA -- Wrong Address

	Exam.	Score				Sex	Hgt.	Wgt.
Capps, Ronald F.	4404	8517	1	32	1	M	5'11"	155
Carr, William W.	4404	8506	1	38	1	M	6'2"	180
McClaney, Tommie L.	4404	8357	0	25	3	M	6'2"	175
Cook, Robert W., Jr.	4404	7958	1	41	1	M	6'1"	160
Campbell, Lawrence	4404	1930	0	29	3	M	6'7"	200
Cromwell, Carolyn	4404	7875	0	21	4	F	5'7"	140
Cousins, Stephanie D.	4404	7864	0	27	4	F	5'4"	160
Creech, Charlotte J.	4404	7864	0	30	2	F	5'4"	140
Mitchell, Wendell B.	4404	7642	1	23	3	M	6'2"	205
Pride, Carl, Jr.	4404	7620	0	40	3	M	5'11"	220
Crenshaw, Richard	4404	7617	1	34	3	M	5'8½"	170
Conti, Billy J.	4404	7597	1	35	1	M	6'1"	180
White, Allan	4404	7566	1	28	1	M	5'11"	175
Spencer, Andrea D.	4404	7559	0	23	4	F	5'4½"	130
Hardley, Jim, Jr.	4404	7515	1	23	3	M	5'11"	174
Hollinger, Alex L.	4404	7500	1	43	1	M	5'11"	182
Pouncey, Allie T.	4404	7500	1	21	1	M	5'8"	155
Smith, Johnny F.	4404	7500	1	40	3	M	6'0"	185
Cordero, Jose A.	4404	7500	1	37	1	M	5'8"	170
Baker, James M.	4404	7500	1	30	1	M	5'7"	182
Oswald, James R.	4404	7408	0	49	1	M	5'10"	140
McInnis, Donald G.	4404	7356	0	32	1	M	5'6"	160
Stevenson, Emogene H.	4404	7218	0	35	4	F	5'8"	170
Green, Eddie W., Sr.	4404	7203	0	30	3	M	5'9"	175
Creech, Robert E.	4404	7163	0	35	1	M	6'0"	200
Woodfin, Betty J.	4404	7086	0	27	2	F	5'6"	140
Kendrick, Hubert L.	4404	7071	0	22	3	M	5'11"	165
Davison, Charles L., Jr.	4404	7051	0	24	1	M	5'6"	152
McAuley, Kathry A.,	4404	7051	0	41	2	F	5'5"	200
Crapps, Clarence E.	4404	7041	0	37	1	M	5'11"	175
Watson, John S.	4404	7040	0	31	1	M	6'4"	210
Johnson, Robert S.	4404	7035	0	26	3	M	5'7"	180
Cobb, Allen R.	4404	7010	0	27	1	M	6'5"	165
Hardwick, Dianne	4404	7010	0	22	2	F	5'7"	125
Rivers, William E.	4404	7005	0	21	1	M	6'0"	145
Clinner, Betty Sue	4404	7000	0	21	2	F	5'9½"	195
Williams, Lula Mae	4404	7000	0	22	4	F	5'4½"	138
Holmes, Mickey R.	4404	7000	0	26	1	M	6'1"	185
Cruden, James Paul	4404	7000	0	25	1	M	5'8"	180
Warren, Vest Eugene	4404	7000	0	47	1	M	6'2"	180
Spivey, James Alvin	4404	7000	0	21	1	M	6'6"	280
Bryant, James Edward	4404	7000	0	29	1	M	6'0"	176
McInnis, Terry E.	4404	7000	0	21	1	M	6'2½"	175
Shelan, Marvin W.	4404	7000	0	21	1	M	6'0"	195
Bell, Frank	4404	7000	0	42	1	M	5'8"	165
Hubbard, David W.	4404	7000	0	21	1	M	6'2"	160

Hanks, Kenneth W.	4404	7000	0	26	1	M	5'10"	150
Gibbons, Leon L.	4404	7000	0	34	1	M	6'2"	185
Mosley, Wayne E.	4404	7000	0	21	1	M	5'8"	140
Ikner, Thomas W.	4404	7000	0	26	1	M	5'11"	160
Fountain, Nick C.	4404	7000	0	21	3	M	5'8"	155
Curry, Albert Lee	4404	7000	0	26	4	F	5'7"	160

Caption of Order Omitted*

ORDER

The motion of the defendants filed herein February 17, 1976, asking this Court to allow all evidence in this case to be presented orally and in open court, is now presented. Upon consideration of said motion and the memorandum in opposition thereto filed February 18, 1976, by plaintiffs, it is ORDERED that defendants' motion be and the same is hereby denied.

Done, this the 19th day of February, 1976.

Richard T. Rives
UNITED STATES CIRCUIT JUDGE
Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE
R. H. Varner
UNITED STATES DISTRICT JUDGE

PROCEEDINGS

C. ROBERT SARVER

having been called as a witness by the plaintiffs, and having been first duly sworn by the undersigned notary public, was examined and testified as follows:

DIRECT EXAMINATION BY COUNSEL ON BEHALF OF PLAINTIFFS:

BY MS. HOROWITZ:

Q Would you state your name, please?

[Dep. p.4]

A Charles Robert Sarver.

Q Where are you presently employed and in what capacity?

A The University of Arkansas at Little Rock in the College of Law and in the Graduate School of Social Work.

Q How long have you been at the University of Arkansas?

A Since September 1971.

Q Could you state your prior job history?

A Immediately prior to that I was Commissioner of the Arkansas Department of Correction, and in addition to which I served as superintendent of both Cummins Prison and Tucker Prison, the Arkansas Intermediate Reformatory.

Q What were the dates of that service?

A From November 1968 to March 29, 1971.

Q And immediately prior to commission in Arkansas?

A I was Director of the Department of Corrections for the State of West Virginia.

Q What were the dates of that?

A From March 1966 to June 1968.

Q Could you state your educational background?

A I have AB and JB degrees from West Virginia University.

Q Would you discuss your duties as a West Virginia Director of Corrections?

A I was responsible for the care, custody, control, discipline and employment of all adults and juveniles in correctional institution or adults and juveniles on parole or adults on probation.

Q How many facilities were there within the prison system?

A Six. That is adult and juvenile.

Q Total of six?

A Total of six.

[Dep. pp. 4-5]

Q Were the prisons segregated on the basis of sex?

Did you have female prisons and than all male prisons?

A Yes.

Q How many of each?

A There were two female institutes, one at Pence Springs, West Virginia for adult females. The West Virginia Training or Industrial School for Girls was at Salem, West Virginia. They were the two female institutions. The others were all male.

Q What was the approximate size of the prison population when you served there?

A It varied drastically during the mid-60's, from a high of probably 1,500 to a low of some 900 total. That is, adult male inmates.

Q Were between 900 and 1,500?

A Yes.

Q What were the total number of employees within the system approximately?

A Seven hundred.

Q How many of that number were employed as guards?

A The overwhelming majority of them.

Q As many as --

A Six hundred — approximately 650, perhaps more.

Q What were the job requirements for a guard position within the West Virginia system?

A That would vary from institution to institution. With respect to the adult facilities at Moundsville and Huttonville, which were facilities for adult males, the responsibilities included both exterior or external and internal security and all the ramifications that those two types of security involved. The movement of inmates, the protection of inmates from one another, dealing with disciplinary matters.

Q What about specifications as far as the candidates

for the positions? Were there educational minimums?

A No.

Q Did you have height and weight minimums?

A No.

Q When you were in the West Virginia system did you use women as guards?

A No, not in the adult male institutions. We did not.

Q Was there a reason why you did not?

A Several. Didn't have many applications for one thing. Didn't have any that I can recall applying for those kinds of jobs.

MR. FLACK: Are we qualifying him as an expert witness or are we going on to the actual testimony?

MS. HOROWITZ: Qualifying him as an expert.

BY MS. HOROWITZ:

Q Go ahead, Mr. Sarver. You said that women did not apply for these positions. Were there other reasons why they were not hired?

A Well, I attempted to use some females in other kinds of positions other than guard jobs and ran into tremendous opposition from the male security staff there at the time. So there was great opposition to hiring women within the prison system.

Q Could you now describe your duties for me as director of corrections in Arkansas?

A I was responsible for the administrative and executive obligations of the Arkansas Board of Corrections which included supervision of both Cummins and Tucker Prisons and all adults on parole and the majority of the adults on probation.

Q There were Cummins and Tucker. Any other facilities within the Arkansas system?

A No, not in the Department of Correction. The Cummins Institution included the Women's Reformatory where

our adult females were imprisoned.

Q So your prison population was segregated by sex?

A It was.

Q What was the approximate size of the inmate population?

A Total? It varied once again. Pretty close to 2,000, between 1,800 and 2,000.

Q How many employees within the system?

A Very few. That too to some extent fluctuated, probably a total of 50 employees altogether. They used the trusty system. That would vary, but that's kind of an average.

Q And how many of those people were employed as guards?

A Most of the guards were trusties. The staff that were free world staff for the most part were supervisors of trusty guards. The majority of them supervised trusty guards. We had a very large farming operation here so that a lot of our employees were also farm supervisors.

Q To what extent, if any, were women utilized in employment within the Arkansas Prison System?

A I used several women extensively. One was Mrs. Callie Schull who served as dietician and food service supervisor for a year.

Q Was she in a position where she had contact with the prison population?

A Oh, yes. She operated the kitchen alone. She didn't even have any other free world help and she operated it exclusively with inmate help. That was at Cummins Prison, the maximum security unit.

Mrs. Jean Bronson served on my staff here in Little Rock and spent most of her time at Cummins Prison both with the men and the women in special volunteer kinds of — coordinating volunteer efforts with communities and inmates.

Cynthia Houchin was also an administrative assistant

who devoted a great deal of her time between developing programs at both Cummins and Tucker.

Both of those latter two women were in direct contact with inmates also almost all the time. I used women as extensively as I was able to use them. I did not have the opposition here to it that we had in West Virgina.

Q So there were a number of women during your tenure in positions such that they had contact with male prisoners?

A Yes.

Q Mr. Sarver, —

A I might add also that there were a great many clerical and secretarial kinds of people. There were a great number of them in the system, and those which were at the prisons were also positioned where they would come in contact with inmates on a regular basis.

Q Are you personally familiar with prison systems other than West Virginia and Arkansas?

A Yes.

Q Could you name them?

A Alabama, Georgia, Mississippi, West Virginia, of course, and then, of course, a great many jails. Minnesota Prison at Stillwater. You want jails too?

Q I don't need them by name.

How did you acquire this personal knowledge?

A Visiting the institutions and serving as an expert witness for inmates.

Q Could you describe generally speaking the duties of a prison guard?

A Yes. In the broad sense of the word the duty involves both security against escape, keeping the inmates in, and internal security involving keeping order within the institution. This would depend, it would vary from slot to slot what the officers' responsibilities would be. For example, a tower guard has rather limited responsibilities. He's con-

cerned almost totally with external security. His responsibilities involve keeping the inmates in.

The officers in a cell block on the other hand would have much more diverse responsibilities.

Q Could you give us a profile of the average prison guard in terms of sex and age and education?

A He is probably white, male, eighth grade education, eighth to tenth perhaps. Rural background. Probably between the ages of 45 and 55.

Q What in your opinion are the qualifications that a prison guard should possess in order to perform effectively?

A Compassion, love for his fellowman, general sense of fairness, common sense, and good sense of humor.

Q How important is physical strength in your opinion?

A Not important at all.

Q In your opinion would the fact that a person holds a degree in a related field have a correlation with that person's ability to perform as a prison guard?

A It probably would, yes. It would indicate in the first place great motivation, a lot of interest and pretty good insights in the human behavior problem.

Q In your opinion, Mr. Sarver, is there a positive correlation between a person's height and weight and that person's ability to perform as a prison guard?

A None whatsoever.

Q In your experience does one out of one combat situation arise frequently within the prison system?

A Between officers and inmates?

Q Yes.

A No.

Q With what degree of frequency generally speaking would you say it occurs?

A Rarely.

Q In your experience do most prison systems segregate

the inmates by sex?

A Yes.

Q Do they assign male guards to male prisons and female guards to female prisons, generally speaking?

A Yes.

Q Mr. Sarver, is there any reason in your opinion why women should not be hired and assigned as prison guards on an equal basis with men?

A None

Q Is there any risk of sexual assault if you put a woman as a guard in contact positions with male prisoners?

A Oh, I suppose there's an element of it. There would be in anything. I would say, however, it would be negligible.

Q The risk of sexual assault would be negligible?

A The risk of any kind of assault.

Q Do you think that using women such that they are in contact with male prisoners infringes on the privacy rights of those prisoners?

A Not any more than their rights of privacy are infringed upon by male guards.

Q What are the advantages to a prison system, if any, in your opinion, of hiring and assigning women on a equal basis with men?

A Say that again.

Q Are there any advantages in your opinion in hiring and assigning women on an equal basis with men?

A Yes. My experience has been that when women are used in close contact with male inmates that the male inmate's behavior generally seems to improve. He will shave more frequently. He will bathe more often. His language will clean up. He will generally make himself more nearly a gentleman than he might if he were around male officers all the time.

Q Mr. Sarver, you stated that you were personally

familiar with the Alabama Prison System, correct?

A That is correct.

Q Could you describe specifically the nature and dates of your contacts with the Alabama Prison System?

A Yes. I visited the Fountain Facility at Atmore, Alabama on January 6th, I believe. That would have been 1975.

I visited Mount Meigs, Draper and Holman in August 1975. I went back to Fountain again on that same trip so that I have had those visits.

Q Are you familiar with the functions of a correctional officer or correctional counselor as they are currently used within the Alabama systems?

A Generally, yes.

Q Based on your knowledge of the Alabama system, Mr. Sarver, in your opinion is a height requirement of five feet, two inches and a weight requirement of 120 pounds a valid criteria for measuring, a person's ability to perform as a correctional officer or correctional counselor?

A No.

Q By way of illustrating that answer, Mr. Sarver, I will give you a hypothetical. If you had two candidates for the position of prison guard, one five feet, five inches and one five feet, one inch and you knew nothing else about either person, could you say the taller of the two could perform better?

A No.

Q And another hypothetical. If you had two candidates, one of whom weighed 125 pounds and one of whom weighed 115 pounds, knowing nothing else about either candidate, could you say that the heavier of the two would perform better?

A No.

Q One more hypothetical. If you had two candidates, one of whom had a degree in correctional psychology and one

who had a high school education which of the two would you hire?

A The one with the degree.

Q And why?

A Simply more experience for one thing. Perhaps too nothing more than having lived a little longer. Probably somewhat older. Once again, showing the motivation and interest and stick-to-itiveness to have gone and obtained the degree.

But I think even more selfishly I would be looking toward the future for that person and being able to use that person as something other than a prison guard in the future. I have never had the luxury of a college graduate to ever apply for a job as a prison guard.

Q Based on your knowledge of the Alabama Prison System would you characterize the job of a prison guard as physically dangerous?

A There's an element of danger, yes. Always in a prison there's that element. There is a tense atmosphere.

Q What qualities do you think a guard should posses in order to cope with the job's element of danger?

A Common sense, fairness, stability, mental and emotional.

Q Do you think this ability to cope is dependent on the guard's sex?

A No, it is not.

Q Do you think it's dependent on physical strength?

A None. There is no way physical strength could help you in a situation like that.

Q Why do you say that physical strength is irrelevant?

A Because you are really a minority when you are in an institution. This is particaularly true in Alabama where one officer may be responsible for supervising four barracks at one time. There would be no way, no matter how large or

how strong or how heavy or how tall he is, no way in the world he could ever protect himself if they wanted to get him. It wouldn't matter what his sex was.

Q And if there were trouble would he have to proceed alone or would he be able to call for help?

A It would be preposterous to proceed alone. He would have to send for help.

Q Now you said earlier that generally speaking the occurrence of one out of one combat between an officer and an inmate is very infrequent, is that correct?

A That's correct.

Q Is this true with respect to the Alabama Prison System?

A I would think so. Of course, the question raises the issue of whether one must use hand to hand combat or whether one can use other means of getting a situation under control. A good-trained officer doesn't very often have to use physical force.

Q Mr. Sarver, would you say that a women who is five feet, two inches high and weighs 115 pounds would on the basis of those factors, her sex and her size, be unable to cope with the element of danger involved in being a prison guard?

A No, that doesn't correlate at all.

Q Is one function of an Alabama Prison guard to maintain order and security within the system?

A Yes.

Q Is that a major function?

A Yes.

Q And do you think that this ability is dependent on the guard's sex?

A No.

Q Is it dependent on physical strength?

A No.

Q And if you had a women who was five feet, two inches

tall and weighed 115 pounds, would her sex and her size prevent her from being able to function and maintain security and order within the prison system?

A Not those factors alone, no.

Q Mr. Sarver, are you familiar with the recent court order pertaining to Alabama's prisons?

A I am.

Q Let me ask you what effect, if any, you think this will have, implementation of that order will have on the guards as far as their work atmosphere is concerned?

A It should improve it drastically.

Q And will it in your opinion reduce the element of danger within the job?

A Yes, it will.

Q Could you tell me why?

A Well, for one thing the order calls for almost a doubling of the guard force which should take some considerable pressure off of the officers. I saw officers and talked with officers at Atmore who were indeed responsible for four barracks. One officer responsible for four barracks during the very busy time of the day when I was there. That is like no security at all. Certainly that situation should be improved with the implementation of the order.

Q What about a classification system for inmates?

A The key to successful control of any prison or correctional institution is its classification system. With sophisticated classification methods inmates can be housed segregated, worked if you will, who are difficult inmates can be kept apart. Staff assigments can be made on the basis of that classification. More nearly tailored treatment programs can be provided within the system which is not possible now.

Q So in your opinion just the implementation of the classification part of the order alone will greatly improve the work atmosphere of the guards. Would that be a correct

statement?

A Yes. For example, Mount Meigs was terribly overcrowded as it was in August when I last saw it, had all types of inmates in the barracks. They were assigned largerly on the basis of space available. It had nothing to do with the nature of the offense, the size of the inmate or his potential for violence, his likelihood of rehabilitation, the length of his sentence. When sophisticated or more nearly sophisticated types of procedures are implemented inmates can be separated so that it is much easier to control them.

Q Is there any reason in your opinion, Mr. Sarver, why women should not be hired and assigned as correctional officers or counselors in the Alabama Prison System on an equal basis with men?

A None.

Q Would you think that there would be a high risk of sexual assault if women were utilized in such a way that they were in contact with male prisoners?

A I don't think so. Certainly there would be a higher risk than would be the risk now with no women there at all. It's not likely the inmates would assault a male officer sexually. I do think, however, that that risk would be negligible.

Q Do you see in the Alabama system any invasion of inmates' rights of privacy were women to be ultized in contact positions?

A Alabama prisoners don't have any privacy now. Even in isolation there are as many as four and five people in the cell.

MS. HOROWITZ: No further questions.

CROSS EXAMINATION BY COUNSEL ON BEHALF OF DEFENDANTS:

BY MR. NEWMAN:

Q You were Commissioner of Corrections in West Virginia from March of '66 to June of 1968?

[Dep. pp. 19, 20]

A Right.

Q At that time was it your testimony that there were no women in the male institution?

A No guards.

Q What was your definition of a guard in West Virginia?

A I don't think I defined it. Do you want me to define it?

Q Yes.

A This would be speaking now at Moundsville and Huttonville.

Q Let's confine this to adult male prisoners.

A Okay. The guards' responsibilities generally were to preserve external security to keep inmates from escaping and to maintain order within the institution. Control the cell blocks, control the movement of inmates, control their activities and conduct, release them from cells and return them to cells and generally supervise the inmates within the system.

Q And is it your testimony that in West Virginia you did not supervise any women in such a position?

A We did not have any women serving in those positions there, that is correct.

Q Now in Arkansas what was your definition of a guard?

A It was much broader than it was in West Virginia. The overwhelming majority of the guards in the Arkansas Prison System were inmates. They were trusties.

Q Did you have any women guards that met that qualification?

A No, we did not because these were all inmates. Now we did use women trusties at the women's prison.

Q So would it be your testimony that you did not supervise any women guards in the State of Arkansas?

A That is correct.

[Dep. pp. 21, 22]

Q And these women that you mentioned that you supervised were not guards?

A That's correct.

Q They would be more in an adiministrative position?

A Administrative position as opposed to security.

Q I believe you testified that they had contact with the male inmates. What was that contact?

A In Mrs. Schull's case it was supervisory. She had probably as many as 50 inmates assigned to the dining room and to the kitchen and she was solely and singularly responsible for the operation of the kitchen and dining room and it was a major institution. She did it alone. She did it all herself. There wasn't even any free world staff at all. She ran the whole thing.

Q And what was the nature of the contact that the other two women had?

A Largely treatment type contact, treatment and organization. In Mrs. Houchin's case it involved the establishment of various treatment programs within the institution. She did supervise groups of inmates setting up such things as AA for example. Alcoholics Anonymous. She organized and helped to implement an educational program where inmates would teach other inmates their skills since she had no treatment staff.

With Mrs. Bronson largely it was coordinating the efforts of people in the community who were volunteer groups to work with inmates who were about to come out of the institution.

Q For an inmate to come in contact with this woman would he have to meet a certain criteria?

A No. As a matter of fact, all three of these women had access to the main body of the population and frequently spent time back there, back in the barracks area. The trusties were always very nervous when they were back there

and some of the supervisors had expressed some concern about them being back there. But they did have access to anywhere in the prison they wanted to go.

Q Then would I be correct in saying that it is your testimony that you have never supervised a woman in a guard position as defined in the State of West Virginia or the State of Arkansas?

A In an adult male prison, that is correct.

Q Have you ever done any studies on a woman's ability to be a prison guard?

A No study. I am familiar with some systems, at least one, where women ar used as guards. This is the DuVall County Jail in Jacksonville, Florida.

Q What is the amount of your familiarity with that system?

A I was an expect witness for prisoners in Jacksonville, Florida. I am quite familiar with both the jail and the system and how it operates.

Q Would you like to tell us about how much time you spent familiarizing yourself with that system?

A I think I have been there on three occasions. I think that's right. Three different occasions that I have been there. I have talked with some of the females about their role. However, that was not my reason for being there, to check on female guards. Frankly I was surprised when I saw them. But I was there to deal with internal security matters.

Q And that is your only familiarity with a system that uses female guards?

A No other one comes to mind at the moment.

Q Is that the DuVall County Jail?

A In Jacksonville, Florida.

Q What type of prisoners were maintained there?

A The same kind of prisoners that are kept in jail everywhere. Accused felons and people who are in there for

misdemeanors.

Q In other words, pre-trial detainees—my definition of pre-trial detainee is one who is being held there awaiting trial, and those convicted of misdemeanors?

A That would be right.

Q Were there any serving state sentences in the DuVall County Jail?

A Not to my knowledge.

Q Any serving felony sentences in the DuVall County Jail?

A Not to my knowledge.

Q Do you have any idea how many systems use female guards?

A. I don't. I really don't know.

Q Would it be few or would it be many?

A I don't know, Mr. Newman.

Q I don't want to put a hypothetical to you. If you had a person who was four feet, seven inches tall and a person who was five feet, two inches tall, and they had the same background, same educational experience, what would you base your decision on as to whether or not to hire this person?

A I think I would have the same problem with that that I would between any two people who had the same qualifications and the same background. I would have little apart from my interview of which person unless he or she came highly recommended from somebody else. I would not allow the size or the height to be the determining factor at all.

Q Let's put a hypothetical that all the determining factors except the height were the same?

A I would have the same problem I suppose that I would with anybody else.

Q What is the definition known to you of a correctional counselor in the Alabama Prison System?

A My understanding and what it intends to be are prob-

ably totally two different things. My understanding is that a correctional counselor is a rhetorical term for what used to be called a guard.

Q And what is your understanding of the duties of a correctional counselor?

A Same duties that a prison guard would have depending on the slot to which the officer was assigned at the time.

Q Be then to control inmates?

A. Yes.

Q Would that duty include controlling internal security?

A Yes. Ingress and egress to and from barracks, to and from work details, to and from the dining hall, all of these kinds of inmate movement.

Q Would this include spot checks of the dormitory?

A Yes, it should certainly.

Q What about spot checks of bathroom facilities?

A Certanly, yes.

Q It is your testimony that a woman spot checks a bathroom facility where a male's privates would normally be exposed and this would not be an invasion of his right of privacy?

A It strikes me as funny that the Alabama Prison System is at all concerned with the rights of privacy of the inmates. It never has been before. In my opinion it doesn't make a bit of difference whether that privacy is being invaded by a male or a female.

Q It is a duty of a correctional counselor to strip search an inmate?

A It could be. May be from time to time.

Q Would you feel that that would be an invasion of his right of privacy to be strip searched by a female correctional counselor?

A I don't think so, no.

Q Would it be the duty of a correctional system to

classify and segregate those inmates that are bent toward violence from those who are not?

A It would be very helpful, yes.

Q What about separating those that are smaller and weaker from those that are larger and stronger?

A That too could be a factor in classification, yes.

Q And what would be the purpose for this?

A. Control. Protecting inmates from each other.

Q Are you aware of any studies that have been made on the ability of women to function as correctional officers or guards?

A I am not.

Q Then you would not know whether these studies if there are any would be conclusive?

A I do not.

Q I believe you testified you were not aware of any other system besides DuVall County that utilizes women as guards?

A I am not personally familiar with any, Mr. Newman.

Q Have you in your experience as the Commissioner of Corrections in both West Virginia and in Arkansas ever had to deal with a hostile situation?

A Yes.

Q Would that decision that you made under those circumstances be swayed in any way if the hostage was a female?

A It would not in any way.

Q Are you familiar with the number of females employed as guards or correctional counselors in the Alabama Prison System?

A I am not. I did not see any when I was there but that doesn't mean there are not some there.

Q You are not familiar then with the positions that they hold as correctional counselors?

[Dep. pp. 28, 29]

A If there are any, I am not familiar. That's correct.

Q Do you know the number of female guards in the DuVall County Jail?

A No, I don't know the total number.

MR. NEWMAN: That's all I have.

REDIRECT EXAMINATION BY COUNSEL ON BEHALF OF PLAINTIFFS:

BY MS. HOROWITZ:

Q You testified that the only system that you are personally familiar with that uses female guards is DuVall County Jail, is that correct?

A That's correct. The only one with which I am familiar.

Q Is there any difference in your opinion as far as the function of a guard is concerned between working in a prison and working in a jail?

A I think a jail is more dangerous.

Q Why do you think that?

A Because the population is a transient population. Many tensions and anxieties exist in a jail which do not exist in prisons, such as frustrations over the inability to make bail, frustration over the inability to contact counsel, or if counsel is contacted, to make meaningful contact. The uncertainty, the unknowing, the anxiety of simply not knowing what's going to happen to one makes tension greater in a jail than it is in prison where at least the matter has been resolved albeit against you.

There is a stability in prison which does not exist in jail. Turnover in jails is phenomenal. Men and women are brought into the jail who are withdrawing from drugs, who are on trips on drugs, and who are alcoholics and have withdrawal problems there. These kinds of problems make jails, I believe, more difficult to deal with than prisons.

Q Mr. Sarver, you are familiar at least as a lay person

[Dep. pp. 29, 30]

with the general duties and responsibilities of a police officer in an average city police department?

A Yes.

Q Could you base on your experience in the prison system, make any comparison between the element of danger involved in a police officer's job and that involved in a prison guard's job?

A I think the element of danger for a policeman is always a great deal greater than the danger factor of a prison guard.

Q Why would you say that?

A Because of the nature of the duties and the mission of a policeman which is to detect—investigate, detect, apprehend, and assist in conviction as opposed to functioning in a relatively stable environment of a prison.

MS. HOROWITZ: Thank you. I have no more questions.

RECROSS EXAMINATION BY COUNSEL ON BEHALF OF DEFENDANTS:

BY MR. NEWMAN:

Q Have you ever been in charge of any institution where the guards did not carry firearms?

A I have never been in an institution where guards do carry firearms. We always had a saying that if you carry a weapon into an institution it better be made out of chocolate because you sure have to eat it.

Q I hate to make these comparisons, but you were talking about that the only system that you are familiar with is DuVall County. Did you have an opportunity to watch the day to day performance of the female guards?

A Only during the period of the time that I was there. I talked with several and inquired. I was somewhat surprised that—I consider that quite a breakthrough. And I discussed with them generally their responsibilities. And the impression that I got was that the female fills the typical guard's role.

[Dep. pp. 31, 32]

As I indicated earlier, my purpose in being there was not to do that and I didn't dwell on it at great length. But they were uniformed officers and the only difference between them and the other officers, they looked just exactly like any other officers except they had skirts on.

Q And you don't have any idea how many there were?

A I don't know the total number. I talked with probably three. I'm sure that I observed five.

Q Is the DuVall County Jail a single cell type operation or is it a dormitory type?

A Well, it's neither. It's a very heavy maximum security type jail. It's not very old. It has what are referred to as bullpens and these are areas off which cells open onto a small area. They are multiple cells but not dormitories. Some of the cells have provisions for eight inmates, some have as few as four, and there are some cells for two. It depended on the flow and depended upon the degree of security. There is pretty heavy security. It is not like a dormitory at all.

Q You have been to other systems and you are familiar with other systems, especially Arkansas and West Virginia. Would you say that each system has its own problems and is different in its own way?

A There is not a substantial difference for example between Fountain and Cummins, at least as they were. Cummins is very much like Fountain is now. Cummins has "come a long way."

Parchman is somewhat different. That's in Mississippi. It has some 21 separate camps.

Draper in physical plant is somewhat similar to Georgia's Breedsville except that it is smaller. The problems are not vastly different. There would not be that much difference between a felon in Alabama and a felon in Georgia or Mississippi or Arkansas in confinement of a maximum security type facility.

[Dep. pp. 32, 33]

The situation in Alabama is largely one of barracks. West Virginia was a very large walled single cell institution. And the problems, of course, in that kind of prison are vastly different. But given the farm-based dormitory style living there would not be a vast difference in the problems of running the two institutions.

Q When you say running is that to mean maintaining security also?

A Well, security is always a greater problem when you don't have the walls for prisoners to crawl over. For that reason some systems such as Cummins, Fountain and the one at Angola, Louisiana refer to an escape as an elopement or a walkoff as opposed to an escape which denotes a considerable amount of ingenuity involved and perhaps some physical power to get over that wall. The escape factor is greater where the men are working out in the fields all the time. They can walk off so much easier than they can in a maximum security type prison.

Q What about internal security? Is there a difference in dormitory and cells?

A Yes. The farm-based system is much, much more difficult to control where the men are in a dormitory situation. Where men are in individual cells obviously it's much easier to control when they are locked in individual cells. You can also protect them from each other.

Q. In other words, the difference in the facility would necessitate a difference in the amount of security needed?

[Dep. p. 34]

Caption of Amended Complaint No. 1 omitted.

AMENDED COMPLAINT NO. 1

Come now the plaintiffs in the above-styled cause and as a matter of right, in accordance with Rule 15(a), F.R.C.P.,[1] amend their complaint as follows:

(A) By deleting from "Section III. Class Action" the following language:

> Plaintiff Rawlinson also represents a subclass of all women who might be employed or are applicants for employment with the Board of Corrections for the position of Correctional Counselor.

and inserting in its place:

> Plaintiff Rawlinson also represents a subclass of all women who are employed, might be employed or are applicants for employment with the Board of Corrections for the position of Correctional Counselor, Correctional Counselor Trainee or Correctional Officer.

(B) By adding the following paragraph:

X. FIFTH CAUSE OF ACTION

1. Defendant Board of Corrections has maintained and continues to maintain a policy and practice of discrimination against women in the hiring and assignment of Correctional Counselors, Correctional Counselor Trainees, and Correctional Officers.

2. Women are not hired or assigned as Correctional Counselors, Correctional Counselor Trainees, or Correctional Officers on an equal basis with their male counterparts.

3. No women are or ever have been assigned to "con-

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[1] Rule 15(a) states, in pertinent part, "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . ." The defendants in the case sub judice have filed a motion for summary judgment and a motion to dismiss. Neither motions are responsive pleadings. Fuhrer v. Fuhrer, 292 F.2d 140 (7th Cir. 1961); Ohio Casualty Ins. Co. v. Farmers Bank of Clay, 178 F.2d 570 (6th Cir. 1949); United States v. Newbury Mfg. Co. 123 F.2d 453 (1st Cir. 1941); See generally 3 Moore's Federal Practice para. 15.07[2].

tact" positions in any of the all-male facilities maintained by the Board of Corrections. ("Contact" positions are those which require constant or daily interaction with inmates, *e.g.*, dormitory patrolling.)

4. The policy of the Board of Corrections in refusing to assign women to "contact" positions in any of the all-male institutions limits employment opportunities for women to those positions where no inmate contact is required.

5. Defendant Board of Corrections' policy and practice of refusing to hire and assign women on an equal basis with men, solely because of their sex, discriminates against Plaintiff Rawlinson and the members of her subclass in violation of 42 U.S.C. § 1983 and the equal protection clause of the fourteenth amendment.

(C) By deleting from "X. Relief" (which now becomes section XI.) the following paragraph:

c. Award back pay to any women who have been applicants for the position of Correctional Counselor but who were not hired because of the minimum height and weight standards.

and adding:

c. Issue its declaratory judgment that Defendant Board of Corrections discriminates against women in the hiring and assignment of Correctional Counselors, Correctional Counselor Trainees, and Correctional Officers.

d. Issue an injunction permanently enjoining the defendants from discriminating against women in the hiring and assignment of Correctional Counselors, Correctional Counselor Trainees, and Correctional Officers.

e. Award back pay to any women who have applied for the positions of Correctional Counselor, Correctional Counselor Trainee, or Correctional Officer but were not hired because of the sexually discriminatory practices of Defendant Board of Corrections.

Respectfully submitted,
JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES
1001 S. Hull Street
Montgomery, AL 36104
ATTORNEYS FOR PLAINTIFFS

MR. JUDSON C. LOCKE,

of lawful age, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARROLL:

Q Would you state your name for the record, please.

A Judson C. Locke, Jr.

Q Would you agree to waive your signature to this deposition?

A Yes.

Q Would you state your present position for me, please?

A I am Commissioner for the Board of Corrections.

Q Could you give me a work history of the jobs that you held leading up to your present position?

A Well, I began as Institutional Classification Officer at Fountain, presently Fountain. Then I was Chairman of the—

Q (Interrupting) When was that, sir?

A It was in 1957. I was the Pilot, Institutional Officer at that institution. Then, in 1961 I was transferred to Central Classifcation where I became Classification Supervisor and Chairman of Central Classification Board.

In 1966 I was made Director of the Frank Lee Youth Center; and, in March or 1972 I was Warden at Kilby—that

was the Medical Diagnostic Center at that time. From there, in July of 1972, I became Deputy Commissioner and held that position until December of 1975. And, I became Warden at Draper and remained Warden at Draper until August of 1975, and I became—

Q (Interrupting) I think you meant December of 1974, didn't you?

A No.

Q December of 1975?

A 1974, excuse me, correct. I was made Warden December of 1974 and remained there until August of 1975, and then I became, I was Deputy Commissioner between August and took over as Commissioner in October of 1975.

Q I believe you mentioned you are an Institutional Officer or Institutional Classification—

A (Interrupting) Classification Officer.

Q What were your duties as an Institutional Classification Officer?

A Well, the duties were to assist the Warden in administrative details in assigning inmates to institutional jobs, and to custody determinations.

Q And you were also Warden at Draper; is that what you said?

A Yes.

Q Were you Warden at any other facilities?

A At Kilby.

Q The Medical and Diagnostic Center?

A And I was Director at the Young Center, which is the head of it, Institutional Head.

Q Could you give me a brief summary of your educational background, sir?

A I have a degree in Sociology, a minor in Political Science from the University of Alabama. I have a Teacher's

Certificate from the University of Alabama, and work toward a Master's.

Q What are your present duties as the Commissioner of Corrections for the State?

A Well, the Commissioner works at the pleasure of the Board of Corrections, a five member board, and under me I have two deputy Commissioners who are appointed, and all other employees are merit system. My duties are to plan and to formulate plans to oversee the supervision operation of all of our institutions, to formulate policies for this operation, supervision.

Q I want to ask you a series of questions now about the various merit system positions in the Alabama Adult Correction System. What is the position of Correctional Officer? What are the particular duties of a Correctional Officer?

A You mean the Security Officer, the Correctional Officer Counselor?

Q I am speaking about the classification of Correctional Officer.

A Well, this is somewhat of a misnomer. We don't have a Correctional Officer classification as such now in existence.

Q When was it done away with?

A When we adopted the Minimum Standards.

Q And when was that?

A This was in, I believe, it was passed in the Legislature in '73.

Q So you no longer are hiring into the position of Correctional Officer at all; is that an accurate statement?

A Now we are re-employing some very few who are on the re-employment registers as Correctional Officers, but to answer your question, we are not pursuing this goal. We are hiring as Correctional Counselors.

Q There are people presently employed as Correctional

Officers?

A Yes, they are protected by the grandfather clause.

Q What are their particular duties?

A The Correctional Officer?

Q The Correctional Officer.

A I suppose you mean—you see I am having difficulty differentiating. We have a Security Class here comprised of the Correctional Counselor and Officer. The duties—

Q (Interrupting) Are the same?

A (Continuing)—By and large initially the same.

Q Okay, let's then talk about the Security Class, which according to your testimony comprises the Correctional Counselor and the Correctional Officer.

A Um hum.

Q And just to set the record straight, you are no longer hiring people as Correctional Officers?

A That is right.

Q When you hire people into the system, you hire them as Correctional Counselors?

A My policy is not to hire unless they meet the minimum standards.

Q The Security Class, as you call them, can you describe their duties for me, please?

A Yes, they have the over-all duty of maintaining security of the inmate, that is custody of the inmate, control of the inmate, to supervise him in his duty assignments, to perform shakedown of the person and do also counseling.

Q Who determines the assignment of Correctional Counselor/Correctional Officers in the actual institutions themselves?

A The Warden; the Warden has the final say-so.

Q Is there a rotating, or the jobs in the institution are on a rotating basis? In other words, a person say who sits on the gate one day will move into another position the next

day, or are they pretty much permanent assignments?

A He should be able to—the employee should be able to work in any position.

Q What duties do the Security Class people have that involve contact with inmates?

A Well, you mean physical contact?

Q Physical contact.

A Per se.

Q Vs. eye contact.

A It would be in the shakedown of a person, a strip shake, a pat down shake; also, when he would have occasion to physically subdue the inmate obviously.

Q In the institutions like Fountain, where there are dormitories used, Correctional Counselors patrol the dormitories, is that correct?

A Well, we have posts, theoretical posts set up to where we can afford the sufficient personnel that will be patrolling the dormitories.

Q But that doesn't exist right now?

A We have many dormitories that one officer sometimes patrols, but we have a minimum, as is set up, designated a minimum of two officers per dormitory when we get up to full strength. And, this would also include people in the hall, etc.

Q How much of the Correctional Counselor's day is involved in dormitory patrol, or do you see that will be involved in dormitory patrol when you implement that particular program?

A You mean of any particular shift?

Q On a given shift, right.

A Well, if you set up a post, stationary post, and this will be a full eight hour post, if you have two officers there in the dormitory, then he will be there for the duration of his shift.

Q Now, the officers in the dormitories, will they conduct latrine inspections at the same time?

A Yes, they would conduct an over-all inspection, over-all supervision, including shakedowns and counts, etc., security checks. I wouldn't have him sitting in a chair, for instance, see.

Q In a given day, how many strip searches are conducted by Correctional personnel?

A This would vary from institution to institution, according to the operation, particular operation that is involved in that institution, you know, as opposed to outside—those that work outside. If you are an institution and have inmates employed outside the institution, you would have a strip search coming back.

Q What institutions are we talking about?

A Then you would have the inside institutions, if this was not employed, working outside. Any time that you have reason to suspect that contraband is being carried from one point to another, you would require a strip search. You do this periodically. You do it on information. You do it routinely, if they are going from outside to inside.

Q So, these facilities where outside personnel are utilized, how many of them are there?

A Well, of course, all your trusty facilities and all your work release facilities. Of course, this is a little bit different type, when you get to work release. This is the cream of the system. You have more trust in this type of individual. But, you have Fountain and Draper, also Kilby, Cattle Ranch. The only institution where you don't have inmates employed to any degree outside, other than to clean up and grass cutting, would be Holman.

Q How many people, say, at Fountain are involved in outside employment?

A Excluding work release, we have two operations; we

have work release of 140 —

Q (Interrupting) Excluding work release.

A We have about 300 on any given day, and this will increase as we get more personnel.

Q How about Draper?

A Draper, you would have about 400.

Q How about Kilby?

A Kilby, you would have around, probably 30.

Q And how about the Cattle Ranch?

A The Cattle Ranch, you would have the whole group, 60.

Q So, is it your testimony that 300 people at Fountain, 400 people at Draper, 30 people at Kilby and 60 people at Cattle Ranch, undergo strip searches when they return to the facilities?

A No, I didn't say every day. At Draper they undergo strip search, those that work at the Central Warehouse and those that work at the Highway Department; those that have access to civilians, they undergo strip search daily.

Q And how many people are we talking about there?

A At Draper?

Q Right.

A Well, when I say this, I am saying that these particular numbers are done systematically. Now, you have periodic shakedowns of all these people, see.

Q Periodic shakedowns of all the people that work outside?

A Plus those that work inside periodically, and on information.

Q How many times are we talking about do these periodic searches occur?

A Oh, I would say —

Q (Interrupting) On an average.

A Average, once every ten days, other than those that

are every day.

Q How many would you say at Fountain are strip searched every day?

A I would just have to estimate this. I would say probably a hundred.

Q And how many guards are actually involved, and I may use the term "guards" throughout, but when I say "guard" I mean "Security Classification"?

A Uh-hum.

Q How many guards are involved in the strip search of these 100 people?

A I would probably say 5 to 7.

Q And what is the total guard force down there, presently at Fountain?

A The total would be —

Q (Interrupting) At a given time when these strip searches would occur?

A You mean any given shift?

Q Any given shift.

A It would be about 18 to 20.

Q And what are your plans for increasing this force? How many are there going to be when the Court Order is fully implemented?

A There will be about 35.

Q Now, at Draper, how many people are strip searched on a daily basis?

A About 55-60.

Q And how many guards are involved in that strip search?

A About 4.

Q And how many guards are on a given shift at Draper?

A I would say about the same number as at Fountain, maybe a fewer number.

[Dep. pp. 14, 15]

Q Now, these strip searches we are talking about all occur during one shift, is that right, or do they occur throughout the day?

A Well, they occur throughout the day, whenever the occasion indicates it.

Q I am speaking now primarily about the strip searches that are done every day.

A Systematic?

Q The systematic strip searches.

A Yes, they would be done on one shift.

Q Now, the 30 people at Kilby, how many of those are strip searched on a daily basis?

A They would have, I think they would probably have, unless they had indications something had been smuggled in, it would be just a random type strip search.

Q So there is no systematic strip search at Kilby?

A Not to my current knowledge.

Q How about the Cattle Ranch?

A No, I don't think there would be a systematic search over there.

Q In any of the regulations that the Board of Corrections hands down, is there any particular orders to the particular Wardens as to how often, say, something like a latrine inspection is supposed to occur?

A It is general orders to this effect that they would be conducted by certain designated personnel in the institution.

Q And how often?

A And as a follow-up, we have general office personnel by directive to conduct a thorough inspection.

Q How often are the latrines inspected?

A Daily.

Q During each shift, or once a day?

A I think probably once a day.

Q In the Answers to the Interrogatories that we pro-

[Dep. pp. 15, 16]

pounded to you, and that you furnished us, there is a category "Correctional Officer — Female". Now, is it my understanding that that position is also being phased out?

A Yes.

Q What was the position when it was in existence? And what do those people that are presently Correctional Officers — Female do?

A The same answer I made to your other question would apply here.

Q Where are the Correctional Officers — Female utilized?

A At Tutwiler.

Q Exclusively?

A No. They may be used for shakedown during visitation, preliminary search of the person, where there is probable cause at Draper and at Kilby.

Q And is the search —

A (Continuing) — And Fountain and Holman.

Q And the search these Correctional Officers Females conduct exclusively on females?

A Females, right.

Q Are there presently male security personnel at Tutwiler?

A We have three.

Q And what are their functions at Tutwiler?

A They are assigned to a hall, and they use them to subdue unruly female inmates.

Q Do they patrol the halls?

A No.

Q Where are they stationed?

A They have one station at night there, in the hall area, not in — in other words, they have dormitories there and they are locked in after 10:00 at night, and he is in the central hall area on that night shift, and then you have one at a back

tower during the day.

Q If a female inmate —

A (Continuing) — and one during visitor's on a Sunday.

Q If a female inmate becomes unruly on the cellblock stair or dormitories at Tutwiler, however you want to describe them, does the male person there on duty go into the female area?

A Only when summoned by the supervisory staff there, and under their supervision.

Q Does the Board of Corrections presently employ women in the Security Force outside of the women that are at Tutwiler?

A Yes, as Correctional Counselor. We have 46, as a matter of fact.

Q How long have you employed women in the position of Correctional Counselor?

A We have employed them at Tutwiler since there has been a woman's prison, from time immemorial.

Q How about at an all male institution?

A We have, I think the first female employed other than at Tutwiler probably was at the Frank Lee Youth Center as a Youth Development Officer was the position. She was basically a stenographer-interviewer-counselor type, and then after that, to further answer your question, we began hiring the Correctional — not Correctional but the — yes, the Correctional Counselor.

Q You said that there are now 46 women employed with the Board?

A There may be a few more, but as of a week ago or two ago.

Q Where are these women assigned to, are some assigned to Tutwiler and some assigned to the male institutions?

A Some are assigned to Tutwiler; do you want me to name the institutions?

Q Please. If you have numbers, I realize you have answered these questions in Interrogatories, but for purposes of our discussion, if you have numbers that would aid in the questioning.

A I can't break it down by institutions, but I can state that most of them are hired at Tutwiler. You have some at Kilby and Draper, I think maybe at Draper 3, some at the Youth Center, some employed in work release, pre-release, work-pre-release, and Fountain and Holman.

Q How many Correctional Counselors, as a rough estimate, are now employed at Holman?

A Correctional Counselors?

Q Correctional Counselors. Female Correctional Counselors, I'm sorry.

A At Holman I would say probably no more than 4.

Q How about at Fountain?

A Fountain, I think they have 5 there in Fountain proper. They may have some more on pre-release.

Q Now, the Answers to your Interrogatories show that there are two females employed at Holman; has that increased, or is it 2, 3, 4?

A I believe there are 3 there, the last, I was down there two weeks ago and I saw 2.

Q And your Interrogatories also say 3 at Draper; is that about correct?

A Yes, it wouldn't be over 3.

Q And 3 at G. K. Fountain?

A I believe we have 5 there now.

Q These 2, 3 or 4, how many female Correctional Counselors there are at Holmon, what specific duties do they perform at the institution itself?

A One of them is assigned to the main entrance and maintains a register of visitors, and does other office type work. She doubles for secretary. I am sure she is utilized on

[Dep. pp. 20, 21]

the visits to do some of the preliminary superficial shakedown of women. Another one is engaged in the central control.

Q What is the Central Control?

A This is the electronic nuclear cell for opening gates. You have switches and what-not.

Q Do you have any idea where the other ones are assigned, if they are there, they are assigned in a similar type job?

A I think it would be in a similar type.

Q Do any of the women assigned to Holman have any contact or are in contact with the inmates?

A No, I would say not.

Q Now at G. K. Fountain, the female Correctional Counselors that are assigned there, what particular duties do they perform within the institutions?

A Related duties as I have stated for Holman, work in the cubical that controls gates on the hall, in the front, not the front gate but the gates on the hall.

Q And here, again, like their contemporaries at Holman, they are not in contact with inmates?

A No.

Q Is the same thing true for Draper, that the women utilized as Correctional Counselors there have no contact with inmates?

A We have two that work in the mail room there at Draper, but this is inside the protected area.

Q So, none of the female Correctional Counselors are involved in dormitory patrol?

A Oh, no.

Q Or strip searches?

A Not at the institutions you have mentioned here.

Q They are all male institutions; they do this kind of thing at Tutwiler and they also, none of them are involved in latrine inspection?

[Dep pp. 22, 23]

A We have some at the Frank Lee Youth Center, and also at Pre-Release — Draper pre-release, that are involved in head counts.

Q The Correctional Counselors at Draper pre-release are involved in head counts?

A And also at the Frank Lee Youth Center. We have one that is assigned to a tower at Kilby.

Q What does she do at the tower?

A She blows them off the fence when they try to get on or get on them.

Q By "blows them off the fence" what do you mean?

A Well, with a gun.

Q So, she is —

A (Interrupting) She is a shooter. I might add that she passed the firing test and indicated that she would shoot one of them if he was caught escaping.

Q The women at the work release centers, pardon me, Correctional Counselor — Females at the work release centers, they are also involved, except the ones you described, are involved in head counts; the other ones don't have any contact with inmates, either?

A Well, they may have — they might be required on an isolated occasion to transport one in the company of a male employee, now to a doctor or an appointment, and this is after the work release.

Q (Interrupting) Have you had —

A (Continuing) — also, it would, might apply to Frank Lee Youth Center.

Q Now, have you ever had any problems with this kind of assignment with the Correctional Counselor — Females?

A What kind of assignment?

Q Allowing them in the company of another officer to take prisoners to doctors?

A Any physical problems between inmate and Counse-

lor in a setting like that?

Q Yes.

A No, because of the other male officer being along.

Q Is it your testimony, thus far there are no female Correctional Counselors employed in contact positions within the all-male institutions; it that correct?

A Right.

Q Why have you chosen to limit this assignment to these kinds of non-contact positions?

A Because there is a basic difference in the — between a female and a male, which renders her less capable of physically subduing or protecting herself or subduing an inmate, should the occasion arise, and also part of that would be the — her mere physical presence, in my opinion, and other people's opinion, would incite trouble and there is a sexual connotation which should go without saying. She is a sex object. And you have inmates who are deprived of sexual outlets, hetero-sexual outlet, and should be obvious. It is to me.

Q The physically subduing an inmate, that was the first reason you cited for not employing Correctional Counselors — pardon me, not employing female Correctional Counselors in contact positions —

A (Interrupting) No response.

Q (Continuing) — outside of your own opinions about the physical requirements that Correctional Officers subdue inmates on occasion, have you used any — do you have anything else that forms a basis for your opinion, other than your experience here?

A Well, I just gave a little bit of my philosophy that would form my opinion, but as I have already previously stated, they are required to control inmates and to supervise them, and to give periodic person searches and this incites an inmate. You have got philosophies, built-in philosophies

that are germane to certain parts of the country, and particularly to the South, as to attitudes of male vs. female. And this is part of the make-up, the reason.

Q Are you aware of any studies that show that the presence of female Correctional Officers has an opposite effect on inmates and tends to calm them rather than incite them?

A I am familiar with some of this, and I have had some personal experience, too, at the Youth Center, being Director there.

Q What is this personal experience you relate to?

A To expand, before I get into that, I don't necessarily buy this concept that females' presence will promote desired behavior. I don't buy that.

Q You were talking about an experience at Frank Lee; would you go on?

A Yes, we had, when I was Director there, we had females, as I have mentioned, in a Counselor type setting. We had stewardesses, female stewardesses and they weren't required to do any head count. They were not secured and non-security. We had stenographer and this sort of thing. And, we, because of the attraction, the opposite sex attraction of these females being present there with this male population, we were always constantly having to guard, be guarded to provide male security for these female employees. The inmates would try to go in the bathroom when they were in the ladies' rest room, designated ladies' rest room. We had caught them in the attic boring holes down in the female rest room, all sorts of this type of actions.

Q Did you ever have any incidents of physical assault on the female personnel?

A No, because we did, not that I can readily recall because we did have this safeguard, recognized the potential and had people studying this all the time, watching it, watch-

ing for it, had your information from other inmates, and we were aware of it, cognizant of it.

Q So, this experience at Frank Lee was one of the inputs into your opinion about the use of Correctional Counselor — females?

A No, it is part of that, and it also is in answer to your question about the studies.

Q Again, back to this particular, one of the first reason that you cited, this physically subduing inmates, can you tell me in a day-to-day basis how many times a Correctional Counselor is required to physically subdue an inmate?

A How many times? I really don't — I couldn't say how many times. The need exists always to have this capability of subduing and does occur daily.

Q It does occur daily?

A Yes.

Q At every institution?

A At every major institution, male institution and female, for that matter.

Q The present population of —

A (Interrupting) When I say "subduing", I don't necessarily mean lay his head open. I mean apprehend him, get him under control, arrest him.

Q And this is one of the things that you don't feel that women can do, is put inmates under control and arrest them, things like that?

A They could not do it as well as a man could do it, because of the physical difference, the strength involved.

Q So, you think that physical strength is an extremely important part of the Correctional Officer?

A It is an extremely desirable requirement because of the need to retaliate and it's potential.

Q How many times in a given day does the Correctional Counselor, be he male or female, how many times during the

day are they required to do something that requires physical strength?

A He could be required daily. He should be prepared to be required at any time.

Q How many times, though, are they actually required to be or actually required to use physical force to subdue an inmate?

A This is hypothetical, but you have got to go on the premise that he has got to do it any time, how many times, he has got to do it as many times as it has confronted him.

Q Now, you presently have a method by which Correctional Counselors are employed, is that correct?

A Yes.

Q Is there anywhere in the employment or screening process where you test the physical strength of the people that you hire as Correctional Counselors?

A This is based on physical condition and physical requirements, minimum requirement.

Q And by minimum requirement, you are speaking about the 5'2" — 120 lbs. requirement, is that correct?

A Well, I am saying that if you have the choice between a person who was of a bigger stature and everything else being equal, I would take the bigger one in this type of work.

Q What have you studied that indicates to you that bigger people are necessarily stronger?

A Well, I say, obviously if you have a person, just for illustration purposes here, you have a person who is heavier and he has the same type training as a person who is lighter, obviously he has more strength.

Q But by obviously, I am not sure that is quite so obvious, is it?

A Well, I would think so, everything else being equal. In other words, I am not saying that a person that is skilled in judo, you know, this can compensate for a lot of weight

in the person who doesn't have the skill. I am saying that a 200 lb. man in top physical condition is stronger than a 100-120 lb. man in top physical condition.

Q Do you imply by your answer that all of the Correctional Officers in the Alabama system are in top physical condition?

A No, I don't imply that. I said if I had the choice, the latitude of choosing between a person who was larger, with everything else, all the physical characteristics being equal, I would take the larger person.

Q Outside of the fact that you test the height and weight, what other physical characteristics do you test before people are employed as Correcional Counselors?

A They undergo a physical examination. They have to meet certain standards.

Q And if these people pass those physical standards, then they can be employed as Correctional Counselors?

A From a physical standpoint, yes sir.

Q But you don't at any time measure any strength at all, do you?

A Well, what I said, the weight and the comparison of weight, weight itself would imply strength.

Q In your mind?

A Well, I said everything else being equal. I'm not saying a blobby, obese 250 lb. man was stronger than a 160 lb. man in good physical condition.

Q Well, let's talk about 5'2" - 120 lbs. requirement. Can you describe anything to me that somebody that is 5'2" - 120 lbs. can do that somebody that is 5'2" 115 lbs. can't do?

A We are getting kind of close right there. That is a matter of 5 lbs. We have minimum standards and we have cut-offs.

Q So, back again to this whole physical thing, you do not test the strength, even though you think strength is an

important part and you base your comparison of strength on height and weight.

A This is part of it.

Q What is the other part?

A His physical condition, the condition of the man that is obese, or he would not be in physical condition.

Q How do you test physical condition prior to employment?

A By physical examination and weight, height.

Q But you don't have people run or jump or lift anything, do you?

A Not unless it is incurred in some exercise for testing heartbeat or what-not, like a treadmill, which I doubt we employ.

Q So, outside of the physical examination, you neither test for strength nor test for physical condition.

A I don't think we have any endurance test.

Q Now, how do you know that the people you presently employ as Correctional Counselors have the capability to subdue inmates in situations as you describe?

A I am saying they have capability more than a female would have.

Q You presently employ some male Correctional Officers that are not very tall and not very heavy, do you not?

A But they are in physical condition and they do meet minimum standards.

Q So long as somebody meets the minimum standards then, in your mind, that is all the strength requirement that you need?

A Under the law, yes, um hum.

Q Well, if you think strength is such an important part of the Correctional Counselor's job, and you think it is related directly to height and weight, why haven't you requested that the standards for the position of Correctional

Counselors be higher?

A Well, in the beginning, we were only allowed through Personnel to have one register. We could not have specified, distinct registers for male and female, so we had to lower the requirements in order to attract females, which we were required to hire. This is the reason for lowering the standard.

Q So, if you had your way, you would have a higher height and weight standard for Correctional people?

A I would have to study that; I probably would.

Q Do you presently employ males who are, say 5'2" - 120 lbs?

A I think that if a male came in and fit the minimum requirements, we would hire him, everything else being equal. I don't know of any offhand that would fit that.

MR. NEWMAN: Excuse me, let him finish his answers.

A I say I don't know of any offhand that would fit that particular 5'2" - 120 lb. category.

Q Now, now this male that you hire at 5'2" - 120 lbs., you would assign him to contact positions with inmates, is that correct?

A He would be required to fulfill any duty that any other Security personnel is required to do.

Q But yet a woman who you hire at 5'7" - 175 lbs. would not have those same positions, is that correct?

A That is right.

Q And why the differential? Do you think that a man that is 5'2" 120 lbs. is better suited to do the job than a woman who is taller?

A You have a psychological, built-in distinction between the way an inmate, a male inmate, perceives a female vs. a male.

Q What do you base this perception on, this perception you have about inmates' feelings toward females?

A By associating with them through this 19 years of

being exposed and knowing how they react, historically, toward women, and how they view them psychologically in their psyche.

Q Have you ever —

A (continuing) — plus personal experience involving assaults on females as recently as last week at Kilby.

Q Have you ever attempted to undertake any psychological studies which would support your opinion about the feelings of the inmates?

A I think there are some in existence now.

Q Do you know any of them offhand?

A Not offhand, but I have read, I am sure there are some studies in existence, some studies that would bear this out in existence.

Q Now you just referenced an assault on a Correctional personnel. Does the Board of Corrections keep records of of assaults on Correctional personnel?

A Yes.

Q As a matter of course?

A All assaults.

Q Where are those records kept?

A They would be kept, I feel sure, at the institution of origin and also at our Investigation and Inspection Division, plus now they are being, as a result of the Pugh case, being forwarded to the District Attorney in the area.

Q Do you, as a matter of course, consult these assault reports?

A I have these reports, in addition to those that are given to a Deputy Commissioner and any that involve an assault of an Officer, I would have access to. I don't have time for any of the rest of them.

Q In the past three years, can you give me a rough estimate of how many assaults on guards have occurred in the Alabama adult system? I am speaking, pardon me, of

assaults on guards by male inmates.

A I have had two killed within the last three years.

Q How about assaults? Do you have any idea of how many guards have been assaulted in the past three years?

A Starting with that two, let's see, I would say probably, in three years, probably 40, depending on your definition of "assault".

Q Well, do you have a definition of "assault" that you base this 40 figure on?

A Yes, I am including simple assault to murder.

Q Okay. Now, the two guards that were killed, I am familiar with Mr. Barrow who was killed during the Holman outbreak — the Fountain outbreak, pardon me, in 1974; who was the other Correctional officer?

A Captain Luke F-A-I-L-S at Holman.

Q When was Captain Fails killed?

A He was killed I think in '74, around July of 1974.

Q And could you describe the situation that led to his death for me briefly? Do you know it?

A Well, yes, he was attacked by an inmate with a knife.

Q And he was killed during that attack by the inmate?

A Yes.

Q Where was he attacked?

A He was attacked in a corridor outside some cells while escorting the inmate to a bath.

Q How many Correctional officers have been killed since the Alabama Adult Correctional System has been in existence; do you have any idea?

A I think there have been three, three killed to my knowledge. There could be more, during my tenure.

Q During you tenure?

A Yes.

Q That is since you have been employed there?

A Yes.

Q That started when, in 1956?

A 1957.

Q Have these 40 assaults on guards, do you have any idea of how many of them involved actual hand-to-hand combat between the guard and the inmate?

A I would say all of them.

Q Okay. Do you have any figure as to how many man hours you have lost because of assaults on Correctional officers?

A In what regard, now?

Q As injuries arising out of these assaults, how many man hours have you lost on the job?

A From the individual itself, of course you can't count those that were killed. I would just have to hazard that. I don't have that readily available. So, I know one that took several months to recuperate; anywhere from a couple of days to several months.

Q Are there are some assaults that no man hours are lost on?

A I would say no. You have got to treat any type of wound, and when I — usually there was a wound involved, even in the simple assault.

Q Would you characterize the present atmosphere in the Adult Correctional System as being dangerous to the guards?

A Yes.

Q Of itself?

A Yes.

Q How do you think this particular atmosphere is going to be changed when you implement a more effective classification system?

A Well, it is going to be changed by attrition because of the Court Order that we have, irregardless of classifica-

tion, that would contribute to it. Obviously, when you have a designed capacity at Fountain, for instance, for 632 inmates and you have over 1,000 there, and you get down to 632, you are going to have a higher officer-inmate ratio of supervision. So, then you are going to have a lot of tension that will be eliminated through this attrition of inmates and coupled with this would be having a suitable area to designate types of inmates which will add to control, take your — along with this we will have new facilities and this will eliminate the congestion and we will be able to have the capability of segregating types, first offenders from hard core type, assaultive types into single cells, and you would be able to designate, or be selective.

Q So, the danger to the guard would be significantly reduced when these new programs are implemented?

A Yes. The danger will be considerably reduced. Along with this, I think I failed to state we will be hiring under Court Order approximately 80% more personnel in Corrections.

Q That will also aid in the over-all situation?

A Of course it will not eliminate it.

Q How many disturbances have occurred, by disturbance I mean major disturbance, in the Alabama Adult Correctional System within the past three years?

A What are you defining as major disturbance?

Q I am speaking about, as a model let's use the outbreak in Atmore in '74, the disturbance at Kilby last summer, that type of thing. How many of those —

A (Interrupting) What outbreak in '74 now? We've had so many; I'm not being facetious.

Q At Atmore when Mr. Barrow was killed.

A Re-state your question, I have lost it.

Q Let's see if we can get around where we can discuss

this so we both understand what we are talking about. You stated that there were outbreaks all the time at Fountain.

A Who did?

Q You did, I think, when I mentioned there was one in '74, you said —

A (Interrupting) I didn't say at Fountain. I said outbreaks, system-wide. I am trying to define what you want.

Q What do you mean by "outbreak"; let's start there?

A I think you should state that.

Q Well, I meant a major prison disturbance that requires, let's say, outside assistance.

A Okay, now you have got it down to where it is simplified a little bit. In how many, in what duration?

Q In the past three years.

A Okay. I would say five or six occasions requiring outside assistance.

Q What are the particular Correctional people on duty at the institutions when these outbreaks occur, what do they do as a result of the outbreak? What kind of actions do they personally take to stop the outbreak?

A Well, all personnel are called in, irregardless of shifts, all available personnel are on stand-by. They are constantly on stand-by if they are under our employ in Security. So, they are called in first of all. All outside work would cease. You would secure these prisoners and then you bring in all available force.

Q During these —

A (Interrupting) You organize these according to the abilities of the Correctional personnel, etc.

Q How many guards —

A (Interrupting) If you can't cope with it yourself, then you seek outside aid, the Department of Public Safety, whatever, Sheriffs, Police, Criminal Justice.

Q How many guards were injured during these disturbances; do you have any idea?

A During these five or six?

Q Right.

A Let me see, about 15.

Q Okay. And one was killed, right?

A No, three.

Q Three? Now, outside of Mr. Barrow and Captain Fails, who was the third one?

A I am sorry, I am going back further than three years. I am going back there in —

Q (Interrupting) But two were killed in the past three years?

A Two killed.

Q From the standpoint of good prison administration, would you recommend that a guard by himself try to quell one of these outbreaks?

A No, I would not recommend that inasmuch as you could avoid it.

Q So, it would be your recommended policy when one of these things occurs he call for assistance and not try to —

A (Interrupting) Inasmuch as he has that latitude and that option.

Q Inasmuch as he has the latitude, sure. In your opinion, what qualities should a good Correctional Counselor possess?

A You are talking about Security?

Q Security classification, be he male or female.

A Well, he should be certainly of normal intelligence, no less than normal intelligence. He should be in good physical condition. He should be desirably — have a good physical build, height and weight, well proportioned. He should have a good common sense, judgment, a sense of humor would help.

Q Now, both men and women can possess these qualities, right?

A Yes, they can possess them separately.

Q How important do you think education is to a Correctional Counselor in the performance of his duty?

A I left that out. I would put this as another requirement. They have certainly a minimum of high school education.

Q That is currently your minimum standard, right?

A Yes.

Q How do you feel about education, do you feel it is good for a Correctional Counselor having more education than the minimum standards?

A I am in favor of higher education. It would follow — I think it would be good, you know, education per se, is good.

Q A degree in a field related to Corrections would be a good attribute?

A Yes.

Q The good qualities that you have described, which ones of these do you think are most applicable to these dangerous situations that you say occur in the prison system? Are we talking again primarily about the strength?

A I don't think you can isolate them. You don't — you can't isolate any one of these desirable characteristics.

Q I think I may have asked you this question before, but I want to test the answer again. How many situations on a daily basis does the Correctional Counselor get into that involves physical strength? I think your answer was that you don't know but that it is important that he be ready or have the capability to do it; is that right?

A I say these confrontations occur daily in all institutions and he should have the over-all capability of coping with it.

Q I would like to call your attention to Administrative

Regulation No. 204 which is issued over your signature, and I assume you are familiar with it.

A As relates to what?

Q As relates to selective certification for Correctional Counselor positions.

A Correct.

MR. CARROLL: And I'm going to mark this Plaintiffs' Exhibit A.

(At this time the document is marked as "Plf's A tst Mr. Locke 3/3/76 dgj Reporter"; said Exhibit accompanies transcript as made a part thereof on Page 48 A)

Q Is there an extra copy?

MR. NEWMAN: Mr. Locke has a copy.

Q Do you have a copy before you, Mr. Locke?

A I'm glad I don't have to recall this verbatim.

Q What was your comment?

A I said I was glad I don't have to recall this verbatim.

Q Even though the stated purpose is something, why did you pass this Administrative Regulation, or enact it, or whatever phrase you care to use?

MR. NEWMAN: Would you repeat the question?

Q Let me re-phrase it a little bit different way. How about giving me the benefit of your own opinion as to why you implemented this particular regulation?

MR. NEWMAN: Do you mean the necessity for implementing?

Plaintiff's Exhibit A test. Mr. Locke

EXHIBIT II

STATE OF ALABAMA

BOARD OF CORRECTIONS

February 13, 1976

ADMINISTRATIVE REGULATION

Number 204

Selective Certification

Correctional Counselor I Positions

I. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactory completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000C of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5. Selective certification from the Correctional Coun-

selor Trainee register will be requested of the State Personnel Department whenever a position is being filled which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled

from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedures established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect the power of the Commissioner to hire or discharge any emplyee.

V. REFERENCES

12. Title 45-2000C, United States Code.

13. Letter from the General Council of the Equal Employment Opportunity Commission.

J. C. Locke, Jr.
Commissioner

Annex A — (Same as No. 13)

MR. CARROLL: I think the question is clear.

A Let me go over this.

(Witness reviews document)

A Well, this was set up in an effort to employ the "types" — the Correctional Counselor personnel that we feel can get the job done, the required job task done in our major institutions.

Q Is it an adjunct to this particular Order that females will not be used in contact positions with inmates?

A Well, I thought that it was clear from the outset that me, my particular policy, and with the support of the Board, five-member Board for whom I work, that we do not intend to employ females to work in contact positions in all-male institutions.

Q And this selective certification procedure is designed to accomplish that end?

A It is designed to get the type of personnel we feel can adequately perform as we require.

Q Which in your opinion is male in male institutions?

A Except in certain categories.

Q What do you mean by "except in certain categories"?

A In categories such as where they do not have to have physical contact, such as a tower; if they are qualified to shoot, as I have mentioned, shakedown of females, this sort of thing in central control areas where they are afforded protection.

Q Now, in Part 3, Procedure, Paragraph 8 —

A (Interrupting) I would like to expand on that if I can, just voluntarily.

Q Sure.

A This whole concept of the counselor is somewhat of a misnomer, and it is misleading from the announcement, from the State Personnel as to the duties of the employee. And, this is really superimposed on, that they are No. 1, first and forthwith a Correctional Officer, capable of performing all the duties that are required of a Security Officer. Then they become the Counselor type and it is going to be my direction that in the near future that we adopt this, and that the Counselor-trainee, whatever the position, he will have to become familiar with all of the duties of a Security Officer, whatever is required of him before he becomes a Counselor.

Q So —

A (Continuing) In other words, we have got the cart before the horse, so to speak.

Q So that in your opinion, anyway, and which you recommend to the Board is that a Correctional Counselor be first a Security Officer and secondly Counselor?

A Right, be familiar with all of the regions of the prison and the requirements and job specifications and duties.

Q While we are talking about Correctional Counselors right now, if a female is at the top of the Correctional Counselor register and a position comes open that has been certified, a male only position under Administrative Regulation

204, then the first male on the list will get that particular position, is that correct?

A Well, you have two separate lists, and you would call for a female register to fill these positions that are designated for female, and you would have a male, separate one, and you would have, according to the laws of the Personnel Board, you would have the selectivity of the first three.

Q How many positions have been identified by the Wardens and Directors of the institutions thus far as male only positions?

A This hasn't been finalized, and my administrative assistant is handling this until it is, and then I'm going to look at it and present it to the Board.

Q Then, again, as far as you are concerned, no positions will be certified for females that involve contact positions with inmates?

A This is right. In our all male institutions, you know.

Q In your all male institutions?

A Yes.

Q So the number of female jobs available in all male institutions will be limited to non-contact positions?

A Yes.

Q I would like to go with you, if I could, to Paragraph 9, which says, "The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria" — who developed this particular set of criteria that is found in this Administrative Regulation?

A Well, it is collective development on the part of my staff and myself, with my concurrence and assistance.

Q Paragraph 9A, says, that one of the criteria is the presence of the opposite sex would cause disruption of the orderly running and security of the institution. Now, this is in line with your previous testimony that the presence of females in contact with all male inmates causes this dis-

ruption, right?

A Right.

Q But you have never had any experience with females in contact positions with males, is that right?

A No. I have said that we have had females, we have them in a security function now at the Frank Lee Youth Center, which requires them to be in contact.

Q But that is not one of the presence of the opposite sex that would cause disruption?

A Yes — no, it causes disruption. Could I recite, give you an example?

Q Sure.

A All right. Recently, we had a female Correctional Counselor doing a head count at the Frank Lee Center. She went into a room being used duly for a classroom and T.V. The lights were low. She went in there to take a head count, just the bodies in the room. When she got ready to leave and as she was walking out, somebody reached up and pinched her on the fanny. If she had not been in that situation, this would not have occurred.

Q And what is the Correctional Counselor's name?

A I don't have it; it can be given to you.

Q Do you have an incident report, or something that was filed?

A I am sure Mr. Gilmore can give you that.

Q He is the Warden at Fountain?

A He is the Director — we call them Directors of the Youth Center.

Q Do you have any idea on what date that occurred, approximately?

A I would say approximately three weeks ago, in the month of February.

Q So, that position that she presently is holding out there at Frank Lee Youth Center, it would be your recom-

mendation that be certified an all male position?

A Yes, sir.

Q Because of the incident that happened?

A Not just that incident, because of the potential of more serious incidents, and because of her being required to be alone in the presence of males.

Q Are you aware of any systems that utilize female personnel in contact positions with inmates?

A Exclusively?

Q No, not exclusively, in conjunction with males. I speak about female Correctional people utilized as Correctional officers in all male institutions and performing the same functions as their male counterparts.

A I am aware that females are hired in certain positions. I'm not aware of their specific duties, how they independently carry them out.

Q 9B, "that the position would require contact with the inmates of the opposite sex without the presence of others." That is just a statement of your policy that females are not to be hired in contact positions with male inmates; is that correct?

A Yes, right. This was a justification for separating them.

(At this time a brief recess was taken, after which the deposition resumed as follows)

Q (Continued by Mr. Carroll) And the 9C, "that the position would require patrolling dormitories, restrooms, or showers while in use, frequently, during the day or night". This is another one of the criteria that is used to establish the male only positions?

A Right.

Q What relevant factors are included in that particular criteria that you consider important?

A I consider invasion of the privacy of the inmate, as

well as the female Correctional Counselor, because of the situation that could, such as relieving yourself, the physical necessity for being exposed.

Q And that right of privacy is not violated by the entry of guards being males?

A Not to the degree of the entry of the opposite sex and it also invades her privacy.

Q In your earlier testimony, how many times during the day does the male Correctional Counselor go into the restrooms?

A Would you re-phrase that as relates to previous testimony?

Q I think you testified once before that latrine searches occur usually once a day?

A No, I said latrine inspections.

Q Latrine inspections, I am sorry, occurred once a day. How many times a day would the thing that you referred to in 9C, with regard to the restrooms, how many times during the day would that occur during the day.

A This would vary, according to the institution; but, a minimum of three times a day would be required for a head count, and —

Q (Interrupting) How many —

A (Continuing) But on more occasions than that —

Q (Interrupting) How many Correctional Officers would be involved on that?

A (Continuing) I hadn't completed my answer. You are required to make periodic searches of latrines for purposes other than just head counts. I would say a minimum of three times a day would be for head count purposes, at almost all institutions. At a minimum security institution, it would be required more frequently, as frequently as every two hours, and then you have other occasions for conducting searches of latrines.

Q When the —

A (Continuing) There would be numerous times, would be my answer.

Q When the patrolling of restrooms occurs, how many Correctional Officers are involved?

A Well, it could be as few as 1, 2, usually on just a routine.

Q Now, 9D, "that the position would require search of inmates of the opposite sex on a regular basis." Now, are the search of the inmates of the opposite sex, are those the strip searches we discussed earlier in the testimony that occur, speaking primarily of a systematic strip search that occur when personnel working outside the institution comes back, that and the periodic searches you testify occur as the need arises. Is that what you are talking about in 9D, strip searches?

A Yes, you are required to give, as I testified, four strip searches routinely when they come back into the institution and periodically, random strip searches for contraband and on other occasions when you have information that they have contraband. You have a strip search, and they have a shakedown, pat type search, without stripping.

Q Do you see any problem with females conducting pat down searches?

A I certainly do.

Q What problems do you see with that?

A Invading the privacy of the person being searched and also the female privacy in having to search the male.

Q What about a female police officer conducting a pat down search; do you think the same invasion of privacy occurred?

A If it was conducted in the manner we are required to conduct it, it would be.

Q What is the manner you are required?

A You would have to place your hands on the genital area of the male.

Q And if a female police officer, pursuant to her duties, conducted this same type search, you would agree that would be an invasion of privacy, is that correct?

A I certainly do.

Q Now, 9E, "that the position would require that the Correctional Counselor trainee not be armed with a firearm." This references again one of your earlier answers about using females in non-contact positions. There are no positions outside of the towers where Correctional Officers are armed with firearms, are there?

A No, only unless in an emergency situation.

Q On a day-to-day basis, the guards that actually work in the institutions do not carry firearms?

A Not within the institution. You know, an escort, supervisory —

Q (Interrupting) But certainly not within the confines of the institution?

A No.

Q 10 says, "all institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor trainee registers without regard to sex." I am a bit confused by 10, in light of your earlier testimony that there are separate registers for male and female Correctional Counselors. How does No. 10 work? Suppose —

A (Interrupting) Well, it works that some of these positions that a female can be assigned to, a male can also be assigned to that position.

Q Which register do you pick up off of, the male or the female; do you pick up off the top one of either register?

A Yes.

MR. NEWMAN: Just a second. —

(Mr. Newman confers with Mr. Locke)

MR. CARROLL: Let the record note that Mr. Newman is conferring with Mr. Locke, and also let the record note he is also conferring with Mr. Flack.

MR. NEWMAN: There is some confusion about how this, the practical workings of this selective certification will be handled over at the Personnel Department, which is not —

WITNESS (Interrupting) I think I have the proper understanding of it now.

Q Now, Mr. Locke, you would now answer, based on your consultation with Mr. Newman and Mr. Flack, is that correct?

A I would like to expand on my previous answer and perhaps correct it. My understanding is that there will be one main register, and we will request from this either for a selective register for male or female, but these will be from this one constant register, and so this would apply to that constant register.

Q So, there is a register that is maintained for both male and female, and there is also a register that is maintained for male.

A There is one register that would have male and female, and then we could select either for male or female and you would still be required from the male one to get one of the top three.

Q Now the male register is the register that is used for the selective certification?

A For an all male institution?

Q For an all male institution, a contact position.

A Right.

Q So that if the first five people on the general register, as a hypothetical matter, are females and the position becomes available that has been certified as an all male position, the highest three males on the register would be certified for

that position; is that correct?

A This is my understanding.

Q Skipping over the females that are ahead of the males?

A Uh-hum.

Q Thank you. Can you describe to me the actual mechanics that occurred which led to the promulgation of this Executive — pardon me, Administrative Regulation? Who did you meet with before promulgation?

A I met with — this didn't occur overnight. This is as a Board discussion, key personnel, it is an accumulative response from the staff, which I and the Board concur in.

Q How long a period of time are you talking about?

A Since October 1 —

Q (Interrupting) of 1975?

A Uh-hum.

Q Did you utilize any outside sources in implementation of this Order?

A In setting up this Administrative Regulation?

Q Right.

A I'm sure we did, various resources, sources.

Q What were they, do you recall?

A Well, not offhand.

Q Did you utilize any research from other expert witnesses in the field concerning the conclusions that you —

A (Interrupting) Yes.

Q Who were those?

A These would be the Chairman of our Board, Dr. Thomas Staton.

Q And what was his input into this particular Regulation?

A Well, he agreed basically that we should have separate registers and that females should not be assigned to contact positions in male institutions, and this was concurred in

by the total Board.

Q Did you call on any — or did you utilize any research studies produced by other Correctional systems or —

A (Interrupting) I am sure that this was utilized and knowledgeable to Dr. Staton, who is an expert in abnormal psychology, among other things, and is head of the Psychology Department at Huntingdon and is an author of many textbooks, and is a consultant by many agencies, in addition to being Chairman of our Board.

Q So, he was one of the prime movers behind the input in this particular program?

A I didn't say prime movers; he contributed to it.

Q Who else contributed to the program?

A Well, as I have stated previously, it was a collective contribution on the part of the staff, people who have been involved with this who see this as a problem.

Q Did you consult any staffs in other states?

A Well, I have discussed this with Dr. George Beto, who is a staff consultant to the Human Rights Committee, who has the obligation of implementing the Court Order in the Pugh case.

Q This was after or before the procedures were developed?

A Before.

Q And to your knowledge, you don't know how many selective certifications or how many positions have been certified for selective certifications so far?

A No, this is still being developed.

Q Who develops the job criteria for the position of Correctional Counselor?

A Well, we get input from our Wardens and various personnel, staff.

Q And you collaborate with the Board of Personnel in developing them?

A Yes, Departmental Personnel.

Q Is their a height and weight requirement on the position of Correctional Counselor?

A The trainee?

Q The minimum standard.

A Yes.

Q How was this particular height and weight requirement developed? What kind of input did the Board of Corrections have in the development of the height and weight?

A This was developed before my current tenure as Commissioner, but it is my understanding that this evolved through the necessity, because of the one register that existed, as I stated previously, to date, and we could not at that time get separate registers, and this was put in so that it could be a minimum requirement for females.

Q What relation do you think the height and weight of an individual has to his job performance as Correctional Counselor, the strength thing we have been talking about?

A Well, if — yes — we have been talking about the strength and there is a definite need for having strength, being strong enough to, in certain situations, to subdue, overcome, put under control, arrest individuals and —

Q (Interrupting) What is the — have you ever had any contact with the Alabama Peace Officers Standards and Training Commission about height and weight requirements for Correctional Counselor positions?

A Not me, no.

Q Has anybody from the Board to your knowledge?

A I am sure that they did in developing this.

Q Do you know any specific person?

A No.

Q Have you ever contemplated requesting a higher standard for Correctional Counselor positions?

A I think it would be desirable to get someone that

would be more physically capable.

Q And physically capable as directly related in your opinion anyway in the height and weight of the individual?

A Yes, I think it would be more desirable to have one that was larger, taller, more physically capable.

Q And this based on your personal opinion and your experience?

A Mine and others.

Q And who are the others that you are talking about, just the general others?

A The personnel that, in the Board of Corrections, that have daily contact with inmates and knows of the problem and the solution to it.

Q Are you aware of any systems that have no height and weight requirements?

A No, I am not.

Q Have you ever studied the possibility of dropping the height and weight requirement and replacing it with something related to strength, some test?

A I think there is a positive correlation between height and weight and strength.

Q Do you have anything other than your own personal opinion to support that?

A I am sure there is plenty of supportive documents around. I don't have any on my person.

Q You have never consulted any of these before you formed that opinion, though?

A I am sure that I have through the years, involved in my military experience, and I don't have any documents on me now.

Q What is your military experience, Mr. Locke?

A I have two years' military experience.

Q In what branch of the service?

A The Army.

Q And when was that experience?

A '52 and, let me see '53 to '55, Korean Conflict.

Q Is there any physical testing that occurs after a person is employed as a Correctional Counselor, is a physical testing required by the Board?

A I don't believe that there is a written requirement —

Q (Interrupting) Do you —

A (Continuing) — unless he becomes physically incapacitated, then he would have to undergo another physical to qualify.

Q Do you measure the weight of your personnel, after they are employed at any time?

A Well, yes, we have. It is two-fold. You have a minimum weight and maximum weight that, if they get beyond that, then they certainly are.

Q How often does this measurement of weight occur?

A I really can't answer that.

Q Are you familiar with the term "normalization"?

A I am not sure.

Q By not sure, you are not familiar with the term, or you think it means something?

A I am not sure that I am familiar with it.

Q Is it one of the goals of the Alabama Correctional System to normalize the atmosphere and environment of the inmate?

A Will you repeat that?

Q Is it one of the goals of the Alabama Adult Correctional System to normalize the atmosphere and environment of the inmate? By normalize, I mean, and you can add any definition that you want, I mean making his environment as normal as it possibly can be to the outside world.

A Within the duties that we have in implementing the Court Order, the sentence of the individual, yes.

Q However, the goal of normalization or making the

environment as normal as possible must give way when the considerations that you have raised about female Correctional people are interposed; in other words, it is nice to have a normal environment for the inmates, but you think that by putting females in that environment, the costs are too great. Is that my understanding? Let me re-phrase the question a little more. It would seem to me that having females in daily contact with inmates would be a great step toward normalization of the inmates' environment; but you don't see that as an important goal?

A I don't see that as a workable solution.

Q Mr. Locke, have you had any other than the incident that you described at the Frank Lee Youth Center; have you had any actual assaults on females working in the System, be they Correctional personnel or —

A (Interrupting) Yes.

Q Could you relate to me those other incidents, please; I am speaking about female personnel right now.

A Hum?

Q I am speaking about assaults on female personnel.

A Yes. We have had an employee that was assaulted — this is being investigated now, but assaulted by an inmate with a screwdriver, and —

Q (Interrupting) This is a female?

A Yes, but a male inmate, with intent to ravish.

Q Where did that occur?

A At Kilby.

Q Can you give an approximate date?

A It was last week.

Q Have you had any incidents —

A (Interrupting) Wait a minute, I am reflecting—we had—what was your question, you said "assault"?

Q Assault by a male inmate on female Correctional personnel.

A You said any personnel?

Q Female, any personnel.

A That is the only overt assault that I can—we have had threats of females being taken hostage that were bona-fide.

Q How many of those have you had?

A Oh, about seven.

Q Where did they—which institutions did they come from?

A Kilby, Fountain, Holman.

Q Over what kind of a period are we talking about, since you started utilizing females?

A Since '72. And then we had another overt act of hostage taking which occurred at Draper in 1972, when the Auburn students were touring the facility, two inmates seized a female hostage with a knife and there was a confrontation, and —

Q (Interrupting) Was she harmed?

A What is "harm"? I am sure she had a traumatic experience.

Q She wasn't physically harmed?

A Well, she had a butcher knife at her throat.

Q Do you have any recorded incidents of sexual assaults by male inmates on male guards?

A No.

MR. CARROLL: I have no further questions.

CROSS-EXAMINATION

BY MR. NEWMAN:

Q This incident where the women students from Auburn were taken hostage, do you know if there were male students also on that tour?

A Yes.

Q And it was the women that were taken hostage?

A Right. And the inmates were prosecuted in Court for assault and I believe kidnapping.

Q Would it be your opinion then that given the attitude of the typical male inmate that you testified to earlier, attitude in the Alabama Prison System, that if there was a male and a female Correctional Counselor, would it be your opinion that if an inmate was bent on taking a hostage, which of the two would he more likely attempt to take as a hostage?

A The female.

Q If a female is taken hostage, would this affect the handling of the situation, the hostage-type situation, in your opinion?

A Yes, it would.

Q In what respect?

A Well, to begin with, you could count on the female, maybe I should say you could not count on the female having proper physical strength to cope with the situation as a male would, so when you plan to, you overview the situation, you would have to minimize the amount of physical retaliation that she would be capable of rendering to the situation. You would have the problem of sexual assault to be coped with. And, then the general opinion of the public toward a woman, a mother image vs. the male.

Q All right, now that we are talking on the subject of sexual assaults, if women were hired in contact positions, given the proposition that a sexual assault could occur to a male or a female, would the incidents of sexual assault increase, that is if a woman was hired in the same capacity as a male in a contact position?

A I certainly think so, the potential, the desire, the innate desire for heterosexual relationship is intensified when you are denied this opportunity, and obviously, in my opinion, it would heighten the incident.

Q I want to get back to the description of the Alabama

Prison System. Would you describe the four major institutions, as far as their physical layout would be concerned?

A All right. This would be Fountain, Holman, Kilby and Draper.

Q Right.

A Start with Holman. This is our most secure institution from design. We have more separate lock-up capabilities at that facility, a total of 244, originally designed two-man cells, as compared with a 100 at Kilby. This was the institution when the death penalty was in use that contained the death cells, and the electric chair, and this is I think our most secure institution. We have some of the more custody, higher custody risk types at the institution. We don't do any outside work at Holman. They are confined within the walls, the fences. We have a population of about, presently of approximately 845, had a designed capacity of around 500.

Q Excuse me, to simplify matters, what I am talking about is the layout as compared to whether it is predominantly a dormitory type situation or a single cell type situation.

A I was trying to give you the total picture of it. Well, you have a dormitory layout, basically at Fountain. It is an old type structure. You have the lock-up capability of 64 at that institution.

Holman is also dormitory, except you have a greater segregation type confinement, 244 two-man cells. Other than that you have the dormitory type.

At Kilby you have the dormitory for permanent cadre, and you have a dormitory for those awaiting classification, plus a lock-up capacity of 100 two-man cells.

At Draper you have exclusive dormitory type facility, with no separate lock-up capacity.

Q In your opinion would the type of institution dictate the type of security necessary for a particular institution?

A Yes.

Q Would a dormitory type situation necessitate a greater amount or lesser amount of security?

A You would have to provide more security.

Q Would this security be provided, if the Alabama Prison System was required to hire females in contact positions?

A I think it would compound the problem. The answer would be no. I think it would compound the problems of providing control. You not only would have to provide control to secure the inmates, but you would have to provide security protection for the females.

Q And from your previous testimony, the Alabama Prison System is a predominantly dormitory type situation?

A This is correct.

Q Now, I believe on Direct or Cross, whichever one Mr. Carroll —

THE REPORTER (Interrupting): I call it direct.

Q All right, we will call it Direct then, Mr. Carroll questioned you on, I believe he questioned you as to assaults on Correctional Officers. Now, in the Alabama Prison System are there assaults also on inmates by other inmates?

A Absolutely.

Q Are there situations arising where inmates, one inmate antagonizes another inmate, and it gets to a quarrelsome situation?

A Yes.

Q How important would physical strength, the physical strength of a Correctional Officer be in coping with this situation?

A It is of utmost importance in bringing the situation of this type under control. You have to have physical strength to retaliate resistance.

Q In what respect?

A Well, to simply from separating a pair that happened

to be tied up on the floor there, and in a situation like this, it is voltile and you have to bring it under control as immediately as possible to keep it from spreading. So, you would physically have to put your hands on them and pull them up by the nape of their necks, or put a hammerlock on them, or get a weapon, and if that didn't work, and physically subdue them by beating them over the head.

Q All right, given your —

A (Continuing) whatever action is necessary to bring it under control.

Q Given your testimony as to the attitude of the typical inmate in the Alabama prison system, would the desired results in breaking up inmate confrontations with other inmates be more or less likely to be successful if it was a woman or a man that was the Correctional Officer, or Correctional Counselor?

A I think it would be more successful if it was a male that was intervening to break up the fracas.

Q And do you have an opinion as to why this should be?

A Yes, a definite opinion. One is based on pure physical strength required in subduing the male. Another is the mental attitude that the male has, his male ego vs. the female. You are challenging him when you have a female to subdue him, and this is going to make him assert himself and assert his masculinity. You have got his peers there, so, he has got to live with himself and live with the other people. He would be the laughingstock among the other inmates, males, if he were subdued and overcome against his desire by a female.

Q In other words, the action of the inmate that he would have taken in a situation like that would affect his status among the other inmates?

A Yes.

Q Let me ask you this, how important is height in a dormitory type situation? Would height be a factor in a

dormitory, predominantly dormitory type situation?

A Yes, I think it would be very pertinent to desire a person of a higher stature to be able to see further, over beds, over inmates, have better vision.

Q Are you familiar with the testimony of Robert Sarver in this case?

A Yes, I am fairly familiar with it.

Q There was testimony that some of the advantages, by Mr. Sarver, that one of the advantages in hiring females as Correctional Officers would be that the inmates' behavior would improve, as well as his general appearance or his attitude toward himself. Will you tend to agree or disagree with this?

A I would disagree that any such a modification of his behavior would over-ride the other ramifications of hiring the female in a contact situation. I do not think that it would be any over-all benefit and I want to qualify this by saying that the presence of a female in certain situation, such as the Youth Center, aside from a maximum security, hard core facility, may induce this type of better table manners, for instance, where you are eating in the same room, or may improve his general appearance, but, it would also create problems that would more than offset this because of the sex difference.

Q Do you base this on your practical experience at Frank Lee?

A Yes.

Q And, now Frank Lee Youth Center, is that a minimum security institution?

A It is totally minimum, with no fence, no bars.

Q And is there a certain criteria that the inmate must meet before he can go to Frank Lee?

A Yes. This is a selected type of person. He is a first offender, not over 23, not have a sentence of over 10 years.

He does not have a heinous type of offenses in his background.

Q Would you categorize the typical inmate at Frank Lee as being the, I believe you said in your Direct Testimony that they were the cream?

A Yes.

Q Of the Alabama Prison System?

A Exactly.

Q How would you categorize the success—well, not the success, let me re-phrase the question. In your opinion, would you categorize the use of female Correctional Officers at Frank Lee as a success or a failure?

A A failure.

Q One question that is pertinent. Are all of the inmates, adult inmates in the Alabama Prison System, convicted felons?

A Yes.

Q Do you have any idea as to the number—of these convicted felons, are there those that have been convicted of sex crimes?

A Yes.

Q Do you have any idea how many there are, or what percentage?

A I don't have the percentage, but I would say probably 20%.

Q And are these, is this 20% found in one prison or are they scattered throughout the prison system?

A Throughout the prison system.

Q Are they kept in lock-up type situations, or are they dormitory, or what I am getting at is can they be found anywhere in the Alabama prisons?

A They can be found anywhere in any dormitory situation. And this is due in part to the overcrowdedness and lack of facilities for any type of segregation, but historically

unless they are, by their record they have shown assaults since they have been incarcerated, they are not put into segregation.

Q Would the hiring of women in contact positions in the Alabama Prison System affect, in your opinion, affect the work of the male prison guards in any way?

A Yes, it would create more of a burden on the male Correctional Officer-Counselor. As I stated earlier, he would have the additional responsibility of providing security to the female in a contact situation. This could be demoralizing for him. He has got to, in the vernacular ride shotgun over this female counterpart that is in the institution. He has got to watch after her, keep her from getting assaulted. He can't depend on her in a — as he could a male in a situation requiring force. It just compounds the problem.

Q One final question, would the hiring of females in contact positions in the Alabama Prison System, that is in the male institutions, make security or the maintenance of security in the Alabama Prison System more difficult in your opinion?

A It would.

MR. NEWMAN: That is all.

[Dep 84 to 85]

REDIRECT EXAMINATION

BY MR. CARROLL:

Q Mr. Locke, Mr. Newman asked a series of questions that solicited your opinion on various hypothetical situations. I would like to inquire into that opinion just a little bit deeper. I think one of the questions he asked you was if a male and a female Correctional Counselor were both in a situation where they could be kidnapped, that the female Correctional Counselor would always be kidnapped; is that your testimony?

A No, I don't think that was the question. As I recall

[Dep 91]

it, he wanted to know which of the two would be the target as opposed to the other, and I said a female.

Q And your answer was female, and what is the basis for that particular opinion?

A Because, No. 1, she would be more defenseless from a physical standpoint.

Q What do you use as a basis for the opinion she would be more defenseless?

A Strength, which has permeated this whole conversation, a female —

Q (Interrupting) Per se —

A Continuing) — As opposed to a male is not as strong innately.

Q Regardless of how big —

A (Continuing) — From Adam and Eve, you know, and the inmates know this. I know it. If I am going to go down here into a riotous situation, I want a male with me. I don't want a female who I am going to have to protect from the inmates. And, there is another angle of sexual gratification I am talking about. They would prefer to have this female and then they could sexually assault her while they were waiting to escape, or whatever the original intent was.

Q Have you ever had a situation where a male and female Correctional Officer were in the same situation and the inmates kidnapped the female Correctional Officer?

A We have not had, other than at the Youth Center I already qualified, a female in this situation.

Q But she wasn't kidnapped?

A But this Auburn student was kidnapped.

Q She was not a trained Correctional Officer, was she?

A But this Correctional Counselor at the Youth Center was assaulted by an inmate.

Q But not kidnapped?

A But assaulted.

[Dep 91 to 93]

Q I believe, again, in answer to one of Mr. Newman's questions, you said in a hostage situation, if you utilized females as Correctional Officers, a female Correctional Officer hostage would be a liability, a different kind of liability than a male Correctional Officer hostage; is that accurate?

A This reiterates what I have just stated. She would not be capable of defending herself adequately as a male, and she would also —

Q (Interrupting) And that is —

A (Continuing)—subject to sexual assault and abuse.

Q And that is because of the fact she is a woman?

A She is a female.

Q Have you ever been employed by any other Correctional System other than the Alabama system?

A No. I have not.

Q Have you ever undertaken any studies of procedure in other systems?

A Repeat that, please.

Q Have you ever undertaken any studies of procedure in other Correctional systems?

A Oh, yes.

Q And what systems have you studied?

A Well, I am familiar with Florida's and Mississippi, and some of the Federal institutions.

Q Which Federal institutions, if you can name them?

A Tallahassee. I have knowledge of other institutions.

Q Have you ever consulted any other systems as to their utiliziation of females in Correctional Officer positions?

A Informally.

Q In response to Mr. Newman's questions, several times you indicated that hiring female Correctional Officers in contact positions in the Alabama System would be a burden on the male Correctional Officers; is that right?

A Right, that is correct.

[Dep 93 to 95]

Q And again, this is because of your personal belief that women are weak or don't possess the physical capability?

A I don't say are weak. I said, as compared with a male, they were less desirable to execute force to subdue a situation.

Q What about a woman that is 5'6", 140 lbs.; do you thinks she would be able to perform the job?

A Better than one that was 5'2" and 120.

Q How about a male 5'6", 140 lbs, would he be able to perform the job?

A Would he be able to perform a job?

Q Peform the job of Correctional Counselor.

A If—repeat that, please.

Q Would a male that is 5'6", 140 ibs., be able to perform the job of Correctional Counselor in an all male institution?

A If a male were 5'6", 140 lbs. —

Q Would he be able to perform the job of Correctional Counselor in an all male institution?

A Theretically, yes.

Q What do you men "theoretically"?

A Well, if he qualifies otherwise, yes.

Q But a female 5'6", 140 lbs., would not be able to perform all the duties?

A No.

Q What do you use as a basis for that opinion?

A The innate intention between a male and a female. The physical capabilities, the emotions that go into the pshychic make-up of a female vs. the psychic make-up of a male. The attitude of the rural type inmate we have vs. that of a woman. The superior feeling that a man has, historically, over that of a female.

Q Now, I believe in response to Mr. Newman's question about height, you said that height was important in patrolling a dormitory; is that correct?

[Dep 95 to 96]

A It is desirable. I believe he asked me if it was desirable to have a person in a dormitory that would be higher, have a height advantage.

Q How about someone who is 5'4", would he be able to patrol a dormitory, say at Kilby?

A It would be more desirable to have one that was 5'10".

Q But would the 5'4" be able to perform that duty if he was a male?

A Not as well as one who was higher or taller.

Q But you have hired people to patrol dormitories at Kilby that were 5'4" that were male, have you not?

A I don't know of any specifics.

Q Well, the Answers to your Interrogatories indicate you have.

A I don't have any specific person that would fit that, you know stipulation.

Q I will refer you to a Mr. Billy S. Shewmaker who was—who is presently a Correctional Counselor at Kilby, 5'4", 145 lbs. He is presently serving as a Correctional Counselor at Kirby?

A Yes.

Q And apparently is doing an adequate job since he is still listed as an employee?

A Yes.

Q But, again, it is your testimony that a woman of that same stature would not be able to do the job?

A Not as well as a male.

Q Your testimony to Mr. Newman was that Frank Lee was the cream of the system. Didn't you testify earlier, though, I am sure it is confusing, the work release centers are the cream of the system?

A Well, both of them are. The Youth Center is at the beginning stage, and the work release center is at the end of the confinement stage.

Q Again, in response to Mr. Newman's question, I think you stated that the utilization of women in Correctional Counselor positions at Frank Lee Youth Center was a failure; is that correct?

A That is correct.

Q Did you utilize women in contact positions at Frank Lee?

A Yes.

Q And the contact position was the head count position?

A The head count, the count in the latrine area, the shower area, the dormitory area.

Q How many women did you employ in Correctional Counselor positions at Frank Lee?

A I couldn't tell you how many. We have had several. We have had some that were not made permanent, some who resigned for various reasons. We have some employed now.

Q How long a period of time have female Correctional Counselors been employed at Frank Lee?

A I think since the adoption of minimum standards.

Q Which is?

A Goes back to the Fall of '73 or early '74.

Q What in your mind does an adequate description of the program's failure, what did the program not do or does not do that lets you label it a failure?

A Because it creates the explosive situation even at this facility which is one of our best. You have the best selection of those that go into it. It is an invasion of the privacy of the inmate. It is an embarrassment to the female employee. It is an embarrassment to the inmate. These inmates are in a dormitory at night and are locked in. They have a latrine at the front of the cell there; they have to expose themselves in relieving themselves to the female officer when she is required, as I previously stated, to make a minimum head count every two hours. This requires her go-

ing into a shower area where they could be naked. This is another infringement of their rights, in my opinion.

Q Were there any security problems because of the use of female Correctional Counselors?

A There is constantly a security problem of rape, of a hostage, the assault incident that I referred to the female officer being pinched on the buttocks.

Q Did you have any female Correctional Officers at Frank Lee raped?

A No, and I hope we don't. The potential is there.

Q You have never had any taken hostage either, though, is that correct?

A No.

Q And the one assault you described as the pinching of the buttocks, that occurred three weeks ago?

A This I am aware of. There could have meen more.

MR. CARROLL: I don't have any further questions.

RE-CROSS EXAMINATION

BY MR. NEWMAN:

Q I believe you testified earlier at Frank Lee, when you were there, the males would follow the females into the restrooms; is that correct?

A They would try to come in there on them. They would punch holes in the ceiling. The women would be aware that somebody was watching them. We could see the physical evidence of peeping. Yes, they would congregate because of the attraction of the opposite sex. We had to be constantly aware of this and alert to it, to prevent a hostage and a rape.

Q Did that also go into your opinion, the part of your opinion as to the success or failure of that program?

A Exactly.

Q I believe you testified earlier of the inmates' attitude toward women, the average, typical male inmate in the Ala-

bama Prison System attitude toward women.

A I thought I brought that out, yes.

Q Did this also -- did you also rely upon your knowledge of this attitude in formulating your answers to my direct questions?

A Yes.

MR. NEWMAN: That is all.

RE-DIRECT EXAMINATION

BY MR. CARROLL:

Q How do you determine the attitude of the average inmate in the Alabama System, Mr. Locke?

A Well, I've been involved almost 19 years in direct, one way or the other, supervision, face-to-face situations with inmates and done a lot of interviewing and done a lot of selecting when I was Director at the Youth Center. I had a chance to hear them express their attitude. I have had a chance and opportunity to observe them through this and —

Q (Interrupting) And that is what you used as the basis for this opinion?

A This is one basis of it.

Q And you indicate there is another basis of it?

A Well, I have the opinions of other people who are professionals in the field who I can correlate and discuss, and I think this is a genuine basis.

Q Who are these other people that you mentioned to me?

A I didn't mention anybody. You see, I have been in this a long time. There are multiple people I have come in contact with.

MR. CARROLL: I have no further questions.

MR. NEWMAN: I have no further questions.

FURTHER DEPONENT SAITH NOT.

MR. JAMES JACKSON

of lawful age, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARROLL:

Q Mr. Jackson, will you state your name for the record, please?

A James Jackson.

Q And do you agree to waive your signature to this deposition?

A Yes, sir.

Q Would you tell me your present employment, please?

A I am the Executive Director of the Alabama Peace Officers Standards and Training Commission.

Q Are you also a member of that Commission?

A I was until my term expired about two years ago, something like that, a year and a half, something like that.

Q What did you do prior to assuming your duties as Executive Director of the Commission we are discussing?

A I was the Assistant Chief of Police at Jacksonville, Alabama.

Q And can you give me a brief background of your career in law enforcement?

A Yes, sir. I started out in 1952. I became a Deputy Sheriff, working in that capacity for some 10 or 12 years. I left there and went to the City of Anniston Police Department as a police officer and motor scout, and as an investigator.

Leaving there, going back to a year and half tenure with the Sheriff's Department, and from there then to Jacksonville State University as the Chief of Security in Campus Police or organized, I set up the Campus Police there at the University, now Jacksonville State University. Then I left

there and remained in the City of Jacksonville and became Assistant Chief of Police.

Q How long have you been employed as the Executive Director?

A Since December 1 of 1972.

Q Are you the only Executive Director that the Commission has ever had?

A Yes, sir, right, sir — well, no sir, I say, at this time Representative Walker Hobbie was the Acting Director, or, I believe in the law it specifies Executive Secretary, but everybody calls it, you know, grants and everything, say "Director"'. The law says Executive Secretary.

Q What are your duties as the Executive Director of the Alabama Peace Officers Standards and Training Commission?

A All right; the duties are administrative there at the office, which I only have two other employees working; plus the carrying out the requirements that are set forth by the Commission or their wishes; also then seeing that the regulations or compliance is being done. In other words, I don't investigate. I coordinate with the various hiring agencies in the cities to see that the law is being complied with, etc.

Q How many people are on the Alabama Peace Officers Standards and Training Commission?

A How many people are on the Commission?

Q Right.

A There are seven.

Q Who are they, please?

A The Chairman is Judge Walker Hobbie; Chief Ed Wright — I'm trying to take them in the towns — Sergeant E. H. Kentrell, Birmingham; Richard Hearn, Jasper; Chief A. E. Cooper, Demopolis; and former Sheriff Taylor Wilkins from Bay Minette.

Q Now, the Statute under which you operate, you have a copy of, which is Alabama Law, Regular Session, 1971, Act No. 1981?

A Yes.

Q Under that particular Act it says, "The meetings of the Commission shall be quarterly." How long has the Commission been meeting on a regular basis as required by the Statute?

A Besides the quarterly meetings that are set down, which also spells out in the Act that they can meet in special called meetings, and we have several special called meetings in the thing.

Q And you maintain minutes of all the meetings?

A Oh, yes sir, yes sir — yes, sir.

Q How long has the Commission actually been in operation?

A The last board member, or our first organizational meeting was in February of '72; I believe it was around February, either the 20th or 22nd. I would have to go back. I believe it was the 20th.

Q And it has functioned ever since that first organizational meeting?

A Yes, sir.

Q Under Section 6 of Act 1981, it says, "The Commission shall have the following functions and duties, together with all powers necessary or convenience to the performance thereof:

"6A: To study, obtain data, statistics and information, and make reports concerning the recruitment, selection and training of law enforcement officers in the State, to make recommendations for improvement in methods of recruitment, selection and training of law enforcement officers."

Have you made any such studies since the Commission

has been in existence? By you, I mean, has the Commission?

A Well, sir, may I come back and re-phrase —

Q (Interrupting) Yes, sir.

A (Continuing) For — which part are you speaking of? Are you talking about statistic-wise, or if we recommended any methods of selection, recruitment, etc?

Q Have you studied and obtained data and information?

A Yes, sir.

Q And what particular types of law enforcement agencies have you studied and obtained data and statistics and information about?

A Except five or eight of my members — but anyway, that we had obtained some data from all municipalities in all 67 Sheriffs' departments of the amount of hours worked, the wages — wages, hours, merit system if they had a merit system or not at that particular time.

Q Have you ever studied the State Trooper Force here in the State? Have you ever studied and obtained data and statistics about recruiting?

A None other than just the salary, what they received and hours worked and that they do have a merit system; that is all.

Q Has the Commission, pursuant to its powers under Section 6A ever made recommendations for improvement in the methods of recruiting, selection and training?

A No, sir.

Q Under Section 6B, "The Commission has the power to review from time to time the minimum standards hereinafter described for applicants for and appointees as law enforcement officers."

Has the Commission ever reviewed these minimum standards?

A On several occasions, yes sir.

Q Have you ever reviewed the minimum height and weight standard?

A Yes sir, they have reviewed the whole section.

Q On what particular occasions has the Department — pardon me, the Commission — reviewed the height and weight standards?

A I don't quite understand you, sir.

Q You indicated in response to my first question that on several occasions the Commission had reviewed the height and weight standards, and my next question was, "Can you be more specific as to on what occasions that review occurred?"

A Yes, sir. One of the trainees, or we call them the trainees in our rules and regulations, definition as a trainee in the Police Academy which requires them to receive the 240 hours. A female who did not meet the — I believe you said height and weight requirement?

Q Yes.

A Did not meet the —

Q (Interrupting) Now, for the record, the height and weight requirements under the Act are 5'2" — 120 lbs?

A 5'2" — that she did not meet the weight requirements and that they had asked a waiver or — which was spelled out in one of the Sections of the Law that we could waive this thing, and we did.

Q And that was for a woman to become a member of what? An officer for the —

A (Interrupting) For the City of Gadsden Police Department; and she is a graduate of — I have forgotten what section — at the Police Academy.

Q Is that waiver and the procedure leading up to it reflected in the minutes of the Commission?

A No, sir, this was done through an administrative

decision.

Q Who made the administrative decision?

A I did.

Q You did?

A Yes, sir.

Q How tall was the woman to whom you granted the waiver?

A Sir, without going back and pulling her application and looking at it, I do not know, no sir.

Q Does her application have the details concerning the waiver on file with you at the Commission?

A Yes, sir.

Q Do you recall the woman's name?

A No, sir, not right off hand. It would be no trouble to find it, however.

Q That was a waiver for the weight requirement?

A For the weight requirement, yes sir.

Q Which is 120, so she was below 120 lbs.?

A If my memory serves me correct here, I believe she weighed 118 lbs.; I believe that is what it was.

Q Do you conduct, other than these incidents of waiver, do you conduct any periodic review of the height and weight requirements; in other words, do you sit down at Commission meetings and discuss 5'2" — 120 lbs., whether it should be up or down?

A No, sir.

Q Have you ever discussed that particular requirement?

A No, sir.

Q How did you arrive at this 5'2" — 120 lbs. requirement?

A How did I?

Q Did the Commission arrive at 5'2" — 120 lbs. requirement?

A Sir, I was not — at the time this law was written, I don't know where they obtained, or whether it was copied from someone else, or what, I don't know.

Q Since that time, though, you have — by "You" again I mean the Alabama Peace Officers Standards and Training Commission, have you ever attempted to change that 5'2" — 120 lbs. statutory enactment; right?

A No, sir, as long as the County stays within their weight chart and stuff like this, we would count it, but I don't, really — okay — well — that is all right.

Q Under Section 6C, Powers of the Commission;

"The Commission has the powers to consider, hold public hearings on adopting and promulgate such standards relating to physical, mental and moral fitness of any applicant for or appointee as a law enforcement officer as do not lower the minimum standards."

Have you, again "you" being the Commission ever held any public hearings on these matters?

A Yes, sir.

Q How many times?

A Oh, gosh, I —

Q (Interrupting) I mean a lot of times?

A Yes, sir, yes sir, several times.

Q Have you ever had a public hearing on the height and weight requirements?

A Well, what would you consider — yes sir, I would say there has been a public hearing, yes sir —

Q (Interrupting) When did that —

A (Continuing) — Not on height and weight, not — because no one has been disqualified under the height and weight, no sir. So there is no one ever appeared before the Commission under the height and weight.

Q Have people appeared before the Commission who

did not meet the minimum standards?

A Yes, sir.

Q And in every instance a waiver was granted?

A No, sir, not in every instance, no sir.

Q Okay. We'll get to the waiver question in a minute.

A Okay.

Q Public hearings have never been held on the height and weight requirement to your knowledge?

A No, sir.

Q Under Section K of 6, "the Commission has the power to obtain the services and advice of experts in the field of law enforcement for the purposes of aiding the Commission in its studies, considerations, reports and recommendations, and the adoption of standards, rules and regulations."

In relation to the height and weight requirement, have you ever — again, has the Commission ever obtained the service and advice of experts in the field of law enforcement as to the pertinency of the height and weight requirements?

A No, sir.

Q Under Minimum Standards, Section 7D, "The Commission may for good cause shown permit variances from the physical qualifications prescribed in this Subsection D."

Would you outline for me, please, the procedure that you have implemented pursuant to Section 7D for the granting of a waiver?

A The hiring agency or an individual — if they have been rejected for some employment for the two sections, the height and weight, may either in writing — no formal forms are filled out, just submit to the Commission in writing for us to either waive it, and I, generally — I say I generally, I do issue an administrative decision back to the hiring agency which requests this.

Q What do you use as a basis for your own administrative decision as to whether to waive it in a particular case?

A Just the regular — I am trying to think — like in a doctor's office, your height and weight, according to your —

Q (Interrupting) Do you use a particular height and weight chart?

A No particular, no sir.

Q Well, what kind of chart do you use? Do you have one you refer to all the time?

A Well, I don't refer to the chart directly myself. I say as long as they meet, in my letter, in my administrative decision, they meet this requirement in fact.

Q When you say, "meet this requirement", how do you spell it out in your letter?

A Really, I don't know how I spell it out. I just tell them that this is what they can do.

Q I will give you a hypothetical and see if we can proceed from there.

A Okay.

Q Let's say somebody wanted to be employed by a law enforcement agency that is 5'2" and weighed 115 lbs., and they wrote you and said, "I am 5'2" and 115 lbs." and the minimum standards said 5'2" 120 lbs., what would you do in response to that letter?

A I would advise the hiring agency if, I guess you would call it the medical chart, if they prescribed and met this under the thing that I would give an administrative waiver.

Q So, if the medical chart said the optimum weight for somebody at 5'2" was 110 lbs., that is all you would be interested in, really?

A Re-phrase that again, now.

Q If the optimum weight — by optimum, I mean the most desirable weight for somebody that was 5'2", was 110 lbs., then you would probably grant them a waiver under those circumstances?

A If it was in the medical chart, yes sir.

Q And, again, this medical chart you are referring to, I am unclear as to exactly what it is. Well, let me pose the hypothetical a little further.

A I don't know whether it is called a medical chart. I am using this term myself.

Q I have a copy of an attachment 1 from Air Force Manual 160-1 dated 17 April 1974, which is the height and weight standard minimums. Now, I would like to show you a copy of it and see if this is what you are referring to, this type of chart.

A Similar chart, yes sir.

Q And we will attach this as Plaintiffs' Exhibit A to this deposition.

(At this time the attachment is marked "Plfs's A test Mr. Jackson 3/3/76 dgj reptr"; said Exhibit accompanies this transcript on Page 18 A and is made a part thereof)

Plaintiff's Exhibit A test Mr. Jackson

AFM 160—1[C8] Attachment 1 17 April 1974

WEIGHT TABLE

a. *MALES*

Height, inches	Minimum	Standard	Maximum					
			17-20	21-25	26-30	31-35	36-40	41 and over
60	100	122	146	150	153	157	160	164
61	102	124	149	153	155	159	163	166
62	103	126	151	155	158	161	165	169
63	104	128	155	158	160	164	168	171
64	105	131	159	160	164	168	171	175
65	106	135	163	165	169	173	176	180
66	107	139	166	170	174	178	181	185
67	111	143	171	175	179	183	186	190
68	115	147	176	180	184	188	191	195
69	119	151	181	185	189	193	196	200
70	123	155	186	190	194	198	201	205
71	127	159	191	195	199	203	206	210
72	131	164	196	201	205	209	213	216
73	135	169	201	208	211	215	219	223
74	139	174	206	214	218	221	225	229
75	143	179	211	220	224	228	231	235
76	147	184	216	226	230	234	238	241
77	151	189	221	232	236	240	244	248
78	153	194	226	239	242	246	250	254
79	157	199	231	245	248	252	256	259
80	161	204	236	251	254	258	262	265

NOTE: The weights as listed in the above chart are based on average body build. The maximum weight was calculated by adding two (15%) standard deviations. When lean body mass determination indicates that an individual's body fat is more than 32% of his lean body mass (NOT TOTAL BODY WEIGHT) the above tables DO NOT APPLY.

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b. *FEMALES*

Height, inches	Minimum	Ideal Between	Maximum			
			17-20	21-30	31-40	41 and over
58	87	90-103	115	116	118	120
59	89	92-106	118	119	121	123
60	92	95-109	121	123	125	127
61	95	98-112	125	126	128	130
62	97	101-115	128	129	131	133
63	100	104-118	131	132	135	137
64	103	107-121	134	136	138	140
65	106	110-124	138	139	141	143
66	108	113-127	141	142	145	147
67	111	115-130	144	146	148	150
68	114	119-133	147	149	152	154
69	117	121-136	151	152	155	157
70	119	124-139	154	156	158	160
71	122	127-142	157	159	162	164
72	125	130-145	160	162	165	167

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Q So, if the height and weight matched up on this particular chart, then you would probably grant a waiver?

A Yes, sir.

Q Let me ask you this. Have you got copies of all the waiver letters you have sent out since you have been the Executive Director of the Commission?

A Yes, sir.

Q And they are on file at the Alabama Peace Officers Standards and Training Commission office?

A Yes, sir.

Q And these waivers have been granted the people in law enforcement, is that correct?

A Yes.

Q How many wives have you granted on the height and weight requirement; do you have any idea?

A Do not hold me specifically —

Q (Interrupting) I will take a ballpark figure.

A Okay, four or five.

Q How many of these involve females, again, if you know?

A One that I am real familiar with.

Q How many waivers have you granted in other areas of the minimum standards, again just a ball park figure?

A "In other areas", what do you mean?

Q With regard to education, for instance, age, that type of thing

A Right

Q How many of those have you granted?

A Ball park figures again, I would say in the neighborhood of something like 22 or 23, somewhere in there.

Q Okay. Now, back to 7D again, "The Commission may for good cause shown"—what do you consider good cause shown for the height and weight requirements? Again if it fits the doctor's chart?

A Well, in my professional opinion, if they, I would say if they met all the other criteria—I am giving you one example of a male. He was about 6'4" or 6'5" and he weighed over 300 lbs. In think he weighed 330 or 340. We gave him a waiver on his height.

Q Have you ever had any contact with the Department of Public Safety regarding their height and weight requirements?

A No, sir.

Q Have you ever had any contact with the Board of Corrections involving their height and weight requirements?

A No, sir.

Q Have either of those agencies requested a waiver of either up or down regarding height and weight requirements from you?

A Not in the height and weight, no sir.

Q They have requested other waivers, though?

A Yes, sir.

Q What kind of waivers were those?

A In the Police Training, Subsection C, you see would be the education and the man's experience, etc.

Q Under Section 8, "Penalties", it says "anyone found in violation of this Act shall be guilty of a misdemeanor and on conviction shall be subject to a fine not exceeding $1,000." Has anybody ever been penalized under this Act that you know?

A No, sir.

MR. CARROLL: I have no further questions.

CROSS-EXAMINATION

BY MR. ACTON:

Q Mr. Jackson, I believe that you were asked how many waivers on height and weight requirements your Board had

been requested to make, and that you answered as a ball park figure four or five?

A Yes, sir.

Q I believe that you further answered in response to Mr. Carroll that one of those four or five to your knowledge involved a female.

A Yes, sir.

Q So by deduction the other three or four, as the case might be, would have involved males; is that correct?

A Yes, sir.

Q Did any of the waivers requested by male applicants involve thte minimum standards, that is 5'2" and 120 lbs., as distinguished from being over the top standards? Have you had any requests from a male applicant who was shorter than 5'2"?

A No, sir.

Q Have you had any requests from a male applicant for a waiver because he weighed less than 120 lbs.?

A No, sir.

Q And your best judgment is that in the case of the one female, and I assume from your answer to Mr. Carroll we are talking about some female who wanted to be a police officer in Gadsden, Alabama, your best judgment is that she weighed within 2 or 3 lbs. of the minimum?

A Yes, sir.

Q Set forth in the law?

A Yes, sir.

MR. ACTON: I have no further questions.

MR. CARROLL: No further questions.

FURTHER DEPONENT SAITH NOT.

DEPOSITION OF DIANE K. RAWLINSON

MR. CARROLL: I want that marked Plaintiffs, Exhibit 1.

(At this time the Reporter marks document "Plf's Ex 1 test MF Rawlinson 3/8/76 dgj Reptr"; said exhibit accompanies this transcript and is made a part thereof on Page 11 A thereof)

Q So, in 1974, anticipating your graduation, you attempted to gain employment in the position of Correctional Counselor or Correctional Counselor-trainee, and you were rejected because you failed to meet the minimum weight requirement?

A Yes.

Q And this letter explains that fact?

A Yes.

Q Have you talked to anyone at the Board of Corrections since you were rejected for the position of Correctional Counselor and Correctional Counselor-trainee?

A Yes, last December I went and talked to Gloria Piety.

Q By last December, you mean December of '74?

A December of '74 — 1974, I talked to Gloria Piety. I asked her about some other positions besides this one, and I asked her specifically about this one, and she said that the height and weight requirements, that they were height and weight requirements for that job and that I could not have that job as long as I didn't weigh enough.

Q So, you spoke with Mrs. Piety on two occassions, is that correct?

A Yes. I talked to her this past August, August of 1975, again, and about some other positions with the State, other than this one.

Q At that time did she re-affirm, because you failed to meet the minimum weight requirement, you could not be employed as a Correctional Counselor or Correctional Counselor-trainee?

A Yes.

Q From your knowledge of the field of Corrections, do

you feel that you are qualified for the position of Correctional Counselor or Correctional Counselor-trainee?

A Yes sir, I do.

Q Do you want to be a Correctional Counselor?

A Yes.

MR. CARROLL: I have no further questions.

STATE OF ALABAMA
PERSONNEL DEPARTMENT
402 STATE ADMINISTRATIVE BUILDING
MONTGOMERY, ALABAMA 36104

October 23, 1974

J. S. FRAZER
PERSONNEL DIRECTOR
W. M. ENGLISH
DEPUTY DIRECTOR
STATE PERSONNEL BOARD
RALPH W. ADAMS, CHAIRMAN
TROY
D. KYSER WILSON, VICE CHAIRMAN
ARITON
C. W. (WOODY) ANDERSON
HUNTSVILLE

Miss Dianne K. Rawlinson
1701 University Boulevard B-10
Tuscaloosa, Alabama 35401

Dear Miss Rawlinson:

The position of Correctional Counselor Trainee falls under the prescribed minimum standards for law enforcement officers as established by Alabama Law, Section 1981, dated September 20, 1971. This law (Section 7, paragraph d) states that "the applicant shall not be less than five feet two inches or more than six feet ten inches in height, shall weigh not less than 120 pounds, nor more than 300 pounds ———".

[Dep 11-A]

Since you do not meet the minimum weight requirements as stated above, we regret that it was necessary to turn down your application for Correctional Counselor Trainee.

You did not state what other positions you applied for, but if no physical requirements were specified in the qualifications for these positions, they do not fall under the minimum standards act mentioned above.

We appreciate your interest in employment with the State of Alabama and if we can be of assistance to you in any way, please advise.

Sincerely yours,
Alvin C. Ford
Examination Technician

ACF/ea

[Dep 11A]

LATER EXAMINATION BY MR. NEWMAN

Q November of 1974?

A Right.

Q Did you write them a follow-up letter?

A No, I did not. I attempted to contact them by phone several times and somehow or another I just never did get in contact. They had told me they would contact me, and after a certain amount of time I tried to contact them but I never heard anything.

Q What was the essence of your letter or your contact with the EEO suit?

A When I went -- my contact with them was when I went and filed the complaint.

Q And what was the nature of the complaint?

A It was based on when I was rejected because of my weight, and I told them about that, and they said yes, this is a case of sex discrimination in hiring, and they filed the suit as such.

Q And you have not heard anything from them since?

[Dep 29]

A No.

Q Did you apply for a waiver of the height and weight requirements with the Minimum Standards and Training — is that what you call it, Minimum Standards and Training Commission? Did you apply for a waiver of those requirements with them?

A No.

MR. NEWMAN: That is all I have.

MR. ACTON: Short conference, please.

(At this time a brief recess was taken during which a conference was held between counsel for the Defendants)

Q (Continued by Mr. Newman) Miss Rawlinson, I believe you stated earlier in your deposition that your understanding of the duties of a Correctional Officer, one of the duties would be to conduct a strip search?

A Uh-huh.

Q Do you think that a strip search of a male conducted by a female would arouse this male in any way?

A I don't really know.

Q You don't really know. All right. Would you want to take a guess on the probability of it happening?

A I have no idea; I really don't.

REMAIN PAGES OF DEPOSITION OMMITTED

[Dep 29 to 30]

MOTION FOR LEAVE TO AMEND

Come now the plaintiffs in the above-styled cause and move this Court for leave to amend their complaint by adding to paragraph 5 of Section X, Fifth Cause of Action, the following language, "and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq."

As grounds therefore, plaintiffs state the following:

1. Plaintiffs have alleged that the use of height and weight minimums as hiring criteria by the Board of Corrections violates Title VII of the Civil Rights Act of 1964.

2. Plaintiffs' amended complaint, Section X, Fifth Cause of Action, which contains allegations of sexual discrimination in hiring and assignment, states a claim for relief under Title VII of the Civil Rights Act of 1964, although that statute is not specifically referenced.

3. Plaintiffs, through this amendment, seek to clarify their Fifth Cause of Action to insure that all parties understand that plaintiffs allege that the Defendant Board of Corrections' policy and practice of refusing to hire and assign women on an equal basis with men, solely because of their sex, discriminates against Plaintiff Rawlinson and the members of her subclass in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as well as 42 U.S.C. § 1983 and the equal protection clause of the fourteenth amendment.

Respectfully submitted,

JOHN L. CARROLL
JOSEPH J. LEVIN, JR.
PAMELA S. HOROWITZ
MORRIS S. DEES
1001 S. Hupll Street
Mongtmorey, AL 36104
ATTORNEYS FOR PLAINTIFFS

WILLIAM RAYMOND NELSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. HOROWITZ:

Q Would you state your name, please, sir?

A My name is William Raymond Nelson.

Q Where are you presently employed, and in what capacity?

[Dep 3]

A I am employed as Warden of the Metropolitan Correctional Center, Chicago, Illinois.

Q How long have you been Warden?

A I have been Warden since August, 1974.

Q '74?

A Yes, one year before the institution opened.

Q And this institution has been opened since August of '75?

A That is correct.

Q Would you state your prior job history, please?

A Prior to coming to this facilty, I was with the Bureau of Prisons as a Correctional Program Officer, Washington, D.C., in their Program Planning Division, for a period of one year.

Prior to that, I was Director of Corrections for the City and County of Denver. That was from 1969 to '73.

Prior to that, from 1968 to 1969, I was Assistant Commissioner of Corrections, City of New York.

Prior to that, I was eight years with the District of Columbia Department of Corrections, where I started as a Correctional Officer and finished as an Assistant Director of Corrections.

Prior to that, from 1957 to 1960, I was in the United States Navy as a Naval Officer, assigned primarily to correctional facilities, specifically the Naval Retraining Command, Norfolk, Virginia, and also as a Naval Intelligence Agent.

Q So, your total years' experience in corrections is about twenty, is that correct?

A Approximately twenty.

Prior to my naval experience, I was with the Department of Mental Hygiene and Corrections of the State of Ohio, starting there in 1955, in the juvenile facility.

Q What is your educational background, Mr. Nelson?

A My educational background includes a Bachelor Degree in Social Administration, majoring in Corrections, from Ohio State University; a Master's Degree in Government, with a major in Counseling, from George Washington University.

Q I would like to ask you a few questions about this facility. It is called Metropolitan Correctional Center, is that right?

A That's correct.

Q And it is a part of the Federal Bureau of Prisons?

A That's correct.

Q What kind of facility is it in terms of security?

A Well, the Metropolitan Correctional Center is a multipurpose facility, meaning it serves the criminal justice system here in the Northern District of Illinois and provides several different types of detention services.

Generally, however, you would classify our facility as a maximum security facility. However, we do have minimum custody type prisoners in certain segments of this facility.

Q Could you tell me specifically what kinds of inmates you have? Are there pretrial detainees as well as those who have been sentenced, for example?

A The major portion of our population is the pretrial inmate who is awaiting transfer or is here on writs, awaiting transfer.

Another segment are those who are sentenced and designated to serve their sentence in this facility.

We also have immigration and naturalization detainees who have not been charged with a crime, and short term offenders who have been sentenced by the Court to serve a period not to exceed six months in a work release program.

Q The other group you mentioned, who are serving sentences, would they be convicted felons?

A Yes, correct.

Q What is the average prison population here?

A Well, the average population is approximately 275 at this time. Our capacity is 400.

Q Do you have female as well as male inmates?

A At this time, we have only three females.

Q To the extent that you have female inmates, are they housed separately from male inmates?

A Yes, they are housed separately.

Q Could you describe how the inmates are housed, as far as the physical setting? Is it a dormitory?

A The 400 inmate capacity is divided into ten separate — what we refer to as functional units. A functional unit is a self-contained facility, and most all inmate activity is conducted within that unit.

The standard unit consists of forty-four rooms and surrounding dining area —

MR. NEWMAN: You are describing one functional unit?

THE WITNESS: Yes.

It consists of forty-four rooms. It has adjacent to it showers, dining area, visiting area, exercise area. It has offices for staff and an education area.

BY MS. HOROWITZ:

Q Now, in terms of the guards' assignments, would one guard be assigned to a unit where there are forty-four inmates?

A Yes, one Correctional Officer is assigned around the clock in a standard functional unit of forty-four.

Q What is the total number of employees you have here?

A We have 151 employees at this facility here.

Q And of those, how many are employed as Correctional Officers?

A We have 82 in our correctional force.

Now, when you say "Correctional Officers," we have to break this down as to what specific type jobs.

Q Right. That was going to be the next question, so go ahead.

A The 82 that are employed — or, I should say that we have in our authorized complement, include, of course, the Chief Correctional Supervisor, four Correctional Supervisors, five Correctional Counselors, fifteen Senior Officer Specialists, fifty-six Correctional Officers, and one Security Officer. That makes the 82.

Q When you speak of Correctional Counselor versus Correctional Officer, could you describe for me the duties of each of those?

A Yes. A Correctional Officer, for example, would be assigned to provide and maintain the security and the proper custody of inmates in a functional unit.

He would have other duties, as well: Working the control center, being an activity officer, being a lobby officer — different functions, custody-type functions.

Q So, is it fair to say the Correctional Officer would be what we normally refer to as Guard?

A Yes, most approximately.

Q And Correctional Counselor is what?

A The Correctional Counselor is assigned to a unit to perform strictly counseling duties with the inmates.

Q What are the basic qualification requirements for Correctional Officers?

A The requirement for Correctional Officer is three and a half years of experience, paid or voluntary, that demonstrates ability of a Correctional Officer. In other words, he has to have experience of a supervisory or leadership background, such as teaching or instructing or enforcement of rules; this type of thing.

Q This could be something like Sunday School teaching?

A It would have to be more full time than Sunday School teaching in that respect. He has to have three and a half years of experience. Three and a half years of Sundays would be a problem.

Q What about education?

A I have asked for some notes here to check on that. High school level is required.

Q And if you have beyond high school, would that count towards the three and a half years experience requirement?

A Yes, it would. A B.A. Degree, for example, accounts for three and a half years experience.

Q Is there a height and weight minimum for employment as Correctional Officer?

A No. The requirement is that the height be proportionate with the weight, or vice versa.

Q That is the only requirement with respect to height and weight?

A Correct.

Q Do Correctional Officers receive any physical training prior to becoming employed?

A They receive training in self defense techniques, yes.

Q And how many hours, approximately, would that be?

A Approximately sixteen hours self defense.

Q That's prior to employment?

A No. No, not prior to employment, I'm sorry, after they have been employed, in their preliminary orientation program.

Q So, they get sixteen hours of self defense and that's the total as far as physical training?

A That's correct.

Q And subsequent to becoming employed or after the preliminary period, do they receive any ongoing training in self defense techniques?

A They receive ongoing training; not necessarily physi-

cal training.

Q What kind of ongoing training?

A There would be disturbance control procedures, and that gets into physical or self defense techniques, and there would be firearm training; that kind of thing.

Q Do your Correctional Officers carry firearms on the job?

A No, they do not — excuse me, not unless they are assigned to an outside escort trip.

Q But, inside they would not be armed?

A That's correct, inside the facility.

Q Do you employ women as well as male Correctional Officers?

A Yes, we do.

Q Did you, in your other positions within the field of corrections, utilize women as Correctional Officers, before this facility?

A We would use them in a women's correctional facility, but not in a male correctional facility.

Q Did you have any personal doubts or trepidations about using them when you started here?

A Yes.

Q Could you describe what they were?

A I had some concerns as to what kind of positions they could work in with men.

I was concerned about whether or not they could work isolated on a unit such as we have here, with forty-four men, and work there by themselves.

I was concerned about whether they could work the shifts, particularly during the midnight shift, from midnight to eight.

I was concerned about them working in an open dormitory where the inmates do not have rooms.

And, I was concerned about them working in our isola-

tion unit.

Q Now, in terms of how they function now, do the female Correctional Officers rotate among the various positions and shift assignments within the facility?

A Yes, they do.

Q This means women Correctional Officers are assigned to the areas that house all male inmates?

A That's correct.

Q Are there any job functions which are performed by male officers that are not performed by the female officers or vice versa?

A Yes. The male officers would not strip search a woman, and a female officer would not strip search a man. Those are the basic restrictions.

Q Would that be the only restriction?

A That is the only restriction, yes.

Q So, that means women are assigned to open dormitories in all-male units?

A That's correct, yes.

Q And it would mean that women Correctional Officers would be isolated on a unit with forty-four men?

A That's correct.

Q On what basis was the decision made with respect to restricting the strip searches?

A We felt that would be an invasion of privacy, to require a man or woman to be stripped by a member of the opposite sex.

Q From the standpoint of good prison administration, Mr. Nelson, has this created any problem, that you have a woman in a situation and she can't do a strip search?

A No, this has not presented a problem to us at this facility.

Q When do strip searches need to be performed?

A They are performed as the offender is admitted in

the receiving area, and they are also performed after every visit, and in such cases we always have a visiting officer on a unit during visiting hours, so there are two officers nearby that unit, and one of them is always a male if it is a male unit.

Q But, administratively, you have been able to cope with that restriction?

A It has presented no problems to us.

Q Were there originally any other restrictions with respect to the duties that the women officers performed, when they were first hired into this facility?

A No, I can't recall of any.

Q So, correct me if I am wrong, other than strip searches of male prisoners, female Correctional Officers perform the same duties as male Correctional Officers?

A That's right.

Q Based on your experience in employing women as guards, Mr. Nelson, would you rate the performance of the women compared to the performance of the men?

A The performance of the women is very satisfactory and you cannot compare them as one sex to another.

I would say, if you were comparing sex, there is no difference. Obviously, there are differences in performance between individual officers.

Q Have there been any instances where, for example, a woman has successfully broken up a fight within the facility?

A Yes, there have been.

Q Have there been any sexual assaults on any of the female officers?

A No, there have not been.

Q What have you found to be the attitude of the female officers toward their jobs and the environment within which they are working?

A Well, most of the women that I have spoken with

have indicated they find their job very interesting, very satisfying employment, fulfilling employment, and while they had some initial qualms or fears, these do not exist at the present time. They feel very safe around here.

Q What about the attitudes of the male Correctional Officers towards the women officers?

A Well, generally, they get along very well. I have detected some feeling that they do not feel this is a place for women. Some officers have expressed this, that they feel the women's place is in the home and not in a job comparable to theirs.

Q Has that created any problems from the standpoint of prison administration?

A No, it hasn't become a big problem. We have a very active union, for example, here and the union has not raised this at all as a problem; just isolated individual feelings there.

Q What about the reaction of inmates to having the women as guards?

A The reaction of inmates is generally positive. Any concerns that have been expressed to me have been one of privacy, because, when a female officer is on a male unit and performing her duties, she would have reason to observe a male inmate on the commode and they feel a little uncomfortable about this.

But, this has never been expressed to me in a complaint. It is when I have inquired, probed, and asked them their feelings about women officers.

The general feeling, though, is one of being positive. They feel, in relating to women, it is nice to be able to do this occasionally and, generally, as I say, a positive reaction.

Q Would you say in your experience that there are any visible effects with respect to the inmates as a result of having the women here, either in their behavior or their atti-

tudes?

A Yes. When a woman is on the unit, the men will behave more civilly, more normally. They must project an image which is compatible with the presence of a member of the opposite sex, as would be in any social setting.

Specifically, there is less profanity. They never appear in an undressed manner. In fact, their appearance is always much improved. And, I would say, general behavior, we notice when a woman is on, seems to be a bit better, more civil.

Q Based on your experience, then, if you would, summarize for me what you see, as a prison administrator, as the disadvantages, if any, to utilizing women on an equal basis with men in the guard role.

A Well, the disadvantages, from my experience here at the Metropolitan Correctional Center, we have not experienced any with our present ratio. Possibly, if the ratio became — say a higher number of women, we may experience some problems. But, I have not experienced any at this point.

Q And what is the ratio right now?

A Well, right now, we have thirteen Correctional Officers — twelve of those are Correctional Officers and one is a Correctional Officer Specialist.

Q Females?

A That is correct. I said we had fifty-six Correctional Officers, and twelve are women. We have fifteen Senior Officer Specialists and one of those is a woman.

Q Do you have any idea at what point you would start being concerned about the ratio?

You say you are satisfied with the twelve. You have twelve to forty now, right?

A Yes.

I really don't know. I have to give a very vague answer to this, because I had very strong feelings six months ago

and they have proven not to be too valid, so I will be a little more reserved. I will find out as we go along.

Q Now, the same question: As a prison administrator, what do you see as the advantages, if any, to utilizing women in the guard role?

A One of the basic purposes for employing women in Correctional Officer positions — there are two basic purposes:

One is the fact that the Equal Employment Opportunity Act applies to us; but, the primary purpose is that we are trying to establish a normalized environment for the prisoners in our custody, and the presence of women is a very strong normalizing influence.

So, it does make a more normal environment for the prisoners and, when you have a more normal environment, they behave more normally and civilly; reduces tension.

Q So, is it fair to say that within the federal system the goal for the prisoners in custody is normalization — or that is one of the goals?

A That is one of the major concerns of the Bureau of Prisons, that the environment it provides for prisoners be as normal as the constraints of imprisonment allow.

Q What is this theory based on? Have there been studies with which you are familiar indicating normalization is a good thing? What does that hopefully accomplish with respect to inmates?

A Well, our mission, our obligation, our congressional mandate is to provide safe, secure, humane custody for prisoners in a normal atmosphere. Environment is crucial to providing this kind of custody.

Q Would there be any reason, in your opinion, for a prison system to maintain a policy whereby no female guards are employed in any contact positions in all male institutions?

A That's a very general statement that I don't believe

I could give a definite answer on. When you say "any prison system," it presumes that I would know about their conditions, and I would — it would be difficult for me to answer, to say that "any prison system" — I would presume that some prison systems, if one would let your imagination go, would say "Yes," they couldn't have women. I would have to assume that. But, it is a little too general to give a definite answer.

Q Based on your experience in employing women, what would be your opinion of that kind of policy?

A I could only relate my opinion to a specific set of circumstances. The policy may be very valid considering the circumstances, but I could not make a judgment of that policy without any knowledge of their conditions.

Q So, in terms of employing women in contact positions in all male institutions, what kind of circumstances do you think need to exist in order for that to work successfully, as it apparently has worked here?

A Well, I think there has to be a general feeling of security within the institution, the security of the employees.

I think that hopefully the environment is as normal as possible, because the introduction of women is a normalizing influence.

There should — I was going to say there should not be the opportunity for sexual assault upon the female officer, but, on the other hand, this is not so much a physical state as it is the whole general environment which would facilitate this type of assault or deter this kind of assault.

Q What, in your opinion, are the qualities that a person should possess in order to perform successfully as a Correctional Officer?

A The ability to communicate effectively; maturity; they should be, of course, — as related to communication, they should be able to express themselves very precisely and

clearly; they should not be abrasive in their dealings with inmates.

Q Relatively speaking, how important, in your opinion, is physical strength versus emotional and psychological fitness?

A Well, physical strength is only utilized at a time of confrontation, and ability to deal with tact and diplomacy and competency is called upon almost at all times, so, if you are going to weigh the two — they are two precisely different characteristics — I would say I would put a greater value on the ability to deal effectively with inmates than their physical strength.

Q How often, in your experience, do confrontations, where physical strength would be the primary factor, occur?

A Confrontations at this facility would average approximately once a week.

Q And what would be the procedure that a guard would be instructed to follow in the event that there was a disturbance or a confrontation?

A The officer would summon help as quickly as possible. Our policy is, when we are confronted with a physical situation, to use as many officers — to go in and treat it with force, full in-force, you might say.

Q Say you had the one Correctional Officer assigned to the forty-four man unit, the policy would be that that officer, regardless of his or her sex, would be instructed to call for backup, is that correct?

A That's correct, before a physical confrontation would be made.

Q When we talk about physical strength as being a factor in working as a Correctional Officer, is it necessary that all members of the guard force be heavies, so to speak, or are we talking more about a collective thing?

A Well, it is a collective thing and, obviously, if you do

have an all male force — and with our physical requirements, they are going to vary in size and, of course, size is only in relationship to the inmate with whom they are going to have the physical confrontation — they also vary, vary in physical ability and strength. One may be ill; one may have a bad back; one may have a bad arm. So, it has to be a collective force as opposed to individual.

Q And that would be true whether it was an all male force or desegregated?

A True.

Q In your opinion, Mr. Nelson, is the ability to cope with the job's elements of danger dependent upon the officers' sex?

In other words, if you had two Correctional Officers and you knew nothing else about either of them except their sex, could you say, on the basis of sex alone, which one would be able to cope better with the elements of danger?

A No, I could not, on those limited factors.

Q Could you say, on the basis of the officers' sex, which one would be better able to maintain security and order?

A No, I could not.

Q In your opinion, should a height and weight minimum be used as a criterion for employment as a Correctional Officer?

A In my opinion, I think a height and weight requirement is much too arbitrary. There are so many other factors that are so highly critical to the job.

I think that you have to be extremely arbitrary. You have to take a specific number of inches or specific number of pounds and anybody who differs one way or the other does not make it and, obviously, that is not a valid point of discrimination.

Q With respect to the guard force that you have here — I don't expect you to tell me how tall each of your women is —

do you have short women among them, do you know?

A Let's see. Yes, among our women officers they vary in height from five foot, two to five, eleven.

Q Do you have weight there too?

A Yes. In weight, 113 to 180.

Q So, that would indicate that you have got at least one woman who is five, two and 113 pounds?

A That's correct.

Q Let me give you a hypothetical, Mr. Nelson:

If you had two candidates for the position of Correctional Officer, one was five foot, five and one was five foot, one, and you knew nothing else about either person, could you predict the taller of the two would perform better?

A No, I could not.

Q And the same hypothetical: If you had two candidates and one was 140 pounds and one was 115, knowing nothing else about either of those persons, could you predict the heavier of the two would perform better?

A No, I could not.

Q One more: If you had two candidates and one had a degree in Correctional Psychology and the other had a high school education, would you have a preference between those two as to which you would hire?

A I would have a preference; but, on the other hand, there are many other factors that we consider other than education. But, everything else being equal, shall we say, the person with the college degree would be preferable.

Q And what would you base that preference on?

A The ability to express themselves, written and oral; their knowledge of specific correctional philosophy and approach; a demonstrated commitment to corrections or criminal justice as a career.

MS. HOROWITZ: I have no further questions right now.

EXAMINATION

BY MR. NEWMAN:

Q Mr. Nelson, I believe you testified that your opinion as to the success of women as guards is based upon your experience here at this institution, is that correct?

A Correct. It is based upon my experience which has been six months essentially, or since August, mid-August of 1975.

Q I believe it was also your testimony that there are some situations in which women should possibly not be employed as guards, is that also correct?

A Yes, I did say that.

If I might go back and clarify the other answer, my opinion on women is based on my direct experience here plus the experience of my associates in other Federal Bureau prison facilities, with whom I have discussed their experience, and they have confirmed mine.

Q I want to give you some situations and ask your opinion as to whether or not you feel that women should be employed in a guard position under these conditions.

A Okay.

Q Where the institution is horrendously overcrowded; talking about female guards in a male institution, in a contact position, where the female would come in direct physical contact with a male inmate?

A Isolating these conditions as a single condition, that would not, in my mind, prohibit the use of women.

Q In a dormitory type situation where the bunks in the dormitories are often packed together so closely that there is no walking space between them and sanitation and security are impossible to maintain?

A Under those conditions, I certainly would have some questions about it, because that also implies other circumstances.

See, one of the problems in answering your questions is you are trying to isolate items which, in reality, are not isolated, but are combined with other factors, the types of inmates, culture, so many things.

Answering that specifically, I would have some questions about it, but wouldn't reach a definite conclusion.

Q Where the appreciable percentage of inmates are suffering from some mental disorder and that the mentally disturbed are dispersed throughout the prison population without receiving treatment and that the makeup of this population is ten percent psychotic and another sixty percent are disturbed enough to require treatment?

A Again, you are looking for specific "Yes" and "No" answers and I am immediately relating to our own experience here, where we do have certain psychiatric cases — or one individual case I can remember which we absolutely kept segregated from women because of his assaultive background and, if you were to say — to rephrase it and say if that individual was allowed to roam free in our facility here, I would certainly seriously question the use of women officers there.

Q Let me rephrase that and say my question was intended to be as it was found, that ten percent of the population is psychotic and they remain untreated and they do roam unidentified in the prison population.

A Yes, I would have to definitely say that that would present grave concerns to me on that.

Q Where violent inmates are not isolated from those who are young or passive or weak?

A Yes, that would be another factor that would limit their effectiveness.

Q Where the robbery rate — extortion, theft and assaults are everyday occurrences among the general inmate population?

A Yes. I think I referred earlier to the fact that they work effectively where you do have a more normal type environment.

Q But, in a situation like this, you would not advise — or, you would have doubts?

A I would certainly have doubts, yes.

Q Where the institution is woefully understaffed?

A Again, I am having difficulty with isolating these factors. If you are saying "understaffed," "an understaffed institution," I would not say that that would make a sizeable problem there.

But, if you say "understaffed in all of these conditions," that makes a different situation.

Q Where there is an extremely high inmate-to-staff ratio which makes personal interaction between the two, inmate and staff, virtually impossible because staff members must spend all their time attempting to maintain control or protecting themselves?

A Yes, that would be an obvious concern. Yes.

Q Where in the institution there is -- well, violence is rampant and there is a jungle atmosphere?

A Yes, I would say that would be an inappropriate area for the use of women.

Q Where most prisoners carry some form of homemade or contraband weapon?

A As that relates to the previous condition, yes.

Q Where there are too few guards to prevent outbreaks of violence or even stop those which occur?

A Yes, I have to agree.

Q To agree?

A Yes, I have to agree that that would be an inappropriate place, in my opinion, for women.

Q Where violence is widespread?

A Yes. In the same context, yes.

Q Where inmates are denied any meaningful opportunities to participate in vocational, education or work activities and, as a result, spend most or substantially all of their time crowded in dormitories in absolute idleness.

A The two conditions there and again trying to isolate them presents a problem. Would it be permissible for me to break them down?

Q Yes, sir.

A For example, I would say absence of vocational training programs would not constitute a reason.

Then, of course, the crowded conditions I responded to earlier. You are combining them and I think I would be more clear if I could respond individually there.

Q Well, let's combine all of these conditions that I gave you, not necessarily finding all twelve in one institution, but a substantial number in each institution. Would you feel an institution that has a combination of several of these factors would be an appropriate or inappropriate place for women to be a Correctional Officer in a contact position?

A Certainly, as you state the conditions and, of course, this is somewhat hypothetical, I would have very serious doubts whether this would be an appropriate facility for the employment of women Correctional Officers.

Q Let me ask you: Do you have any idea as to the rate of homosexual activity in your institution, that goes on?

A Yes, I have; virtually none; none discovered.

Q Where there is widespread homosexuality in a prison, would you feel that a situation like that would be appropriate or inappropriate for a woman as a guard in a contact position?

A Alone, as a lone condition, I would say no, it would have no bearing on that, as a singular condition.

Q You do not feel it would affect the incidence of homosexuality among the inmates?

A No, probably — and again, this is an opinion — but I would say that it would have no bearing on that condition.

Q Have you ever been associated with a program, correctional program, that utilizes a farming operation?

A Yes, I have. District of Columbia had a large farming operation.

Q Would women make good farm guards?

A I obviously had no experience with women making good farm guards, but I could see no reason why they would not make good farm guards.

Q I believe in the first part of my cross examination I gave you twelve factors, twelve — we will call them hypotheticals.

Would you consider these conditions to be a normalized or normal effect in a prison?

A I would say it is obviously a very abnormal environment for human beings to be placed in.

Q I believe you testified earlier that a prison should be as normal as possible before putting a woman in there as a Correctional Officer?

A Yes, the introduction of women is a normalizing influence, and you are trying to change a population or make it normal, and it is a question of when you enter the women of this normalizing influence.

But, on the other hand, something as grossly abnormal as you have described, I would have hesitation to place women in that setting.

Q In other words, in a situation such as we have in Alabama, or the hypothetical, you would try to normalize the conditions before placing a woman?

A Yes, very definitely.

Q Now, you have, I believe you said, 275 inmates here?

A That's correct.

Q And a design capacity of 400?

A That's correct.

Q Now, these ten units, self-sustaining units, I believe you called them —

A Yes.

Q — do you segregate these people or separate them or classify them as to who goes in which unit?

A That's correct.

Q In what way do you do this?

A Well, we very obviously place the women in the women's unit; the work release male inmates in a separate work release unit; the immigration and naturalization into their separate unit.

The pretrial, of which there are four units, pretrial category, would be separated, first of all, by when they arrived. We have an admission orientation unit which takes care of one of those four; and the other three are generally based upon the need for separation between co-defendants or persons involved in their cases or violent type offenders.

So, it is generally a separation based upon how they can best adjust to those three units.

And then, we have those that are serving their sentences, and they are in a separate unit.

We have another category, which is maximum security, and they are placed in that unit because they have violated an institutional rule and are awaiting court action or — not court action, but an institutional disciplinary hearing, or they are in there for protective custody or safekeeping. In other words, a very high security risk would be kept in our maximum security unit.

In addition, we have a punitive segregation unit for inmates who have violated the rules and have been found guilty of violating the rules and as a sanction imposed serve so many days in punitive segregation.

And then, there is a hospital area as well.

Q Are the women guards restricted from any of these areas?

A No, they are not.

Q Are they allowed to go in each of these areas by themselves?

A In the maximum security unit, we always have two officers in those units, and one officer, whether it be male or female, is not permitted to go back into the unit unless there is a backup officer.

Q And if there was a woman that needed to go into one of these units, would the backup officer be male?

A Could be.

Q Do you know of any instances where two women have gone back there by themselves?

A I know of one instance personally, where we normally have a man and a woman on a unit but on lunch relief, when I visited the unit, there were two women, and one woman officer escorted me and the other stayed as the backup.

Q But, normally, the male would escort?

A Yes, normally the male would have the contact in the unit and the female would be the backup.

Q And why is that?

A Basically, you have a male and a female and you use them where they are best suited. I mean, maybe it is physical physique, maybe it is the assignment of their position, like there is a one-officer and two-officer.

But, generally, it is the male that goes in. There is no specific procedure or requirement that it be that way.

Q Why is it that generally the male is the one that makes the contacts?

A Generally, because he probably, generally, would be more physically robust, if this was the case, and maybe it is basically from tradition.

Q I believe I limited this particular line of questioning

to your maximum security area. Does this also go for your more minimum security areas?

A In the other security areas, the men and women officers work interchangeably and there is no restriction on that at all.

Q If a woman calls for help, is the backup usually a male or a female?

A It will be anybody who is available at the time. It could include women. We just respond in force. It could be a clerical person. Women do respond to trouble calls as well as men.

Q They would be responding in force?

A In force, yes.

Q So, more than likely there would be at least one male that responded?

A Oh, yes, try to respond with as many as possible. Usually five or six would respond to a trouble call.

Q Do you have any idea of how many of these trouble calls you have had in the last sir months or since women have been employed here?

A I would say there must have been trouble calls of at least a hundred in that period of time.

Q Would you have any opinion as to whether or not the trouble calls have been made primarily by women or men?

A Well, I would say they were primarily by men because of our ratio, the number of men related to women on our staff.

But, as I say, when an alarm goes off, calling for a response, every officer that's available goes and I know of many cases where women have gone and participated in the restraining.

Q How do they make this alarm or how do they make this trouble call, just yell, start screaming?

A No, a trouble call is sounded in three ways. For

example, one is by dialing 222 on the phone. Another is to take the receiver off of the phone and it goes into automatic alarm. A third is to activate a body alarm, person alarm, that unit officers carry with them.

Another way would be by walkie-talkie, if the officer has a walkie-talkie.

Q But, they have alarms on them or walkie-talkies with them at all times?

A Yes, unit officers. The alarms are related to a specific geographic area, so the officer on the unit usually carries a body alarm. A person who moves about might have a walkie-talkie.

Q These are more minimum security areas with the forty-four rooms. Are these rooms -- do these rooms have locking devices on them?

A No, they have a lock on the door, but when you say "locking devices" —

Q Can they be locked at night?

A Yes.

Q Are they locked at night?

A Yes, they are.

Q What time are they locked?

A 10:00 o'clock.

Q What time are they opened?

A 6:00 o'clock in the morning.

Q How many people occupy one of these cells?

A One.

Q So, from 10:00 to 6:00, the cells are locked?

A That's correct.

Q 10:00 at night to 6:00 in the morning?

A Yes.

Q What time are your shifts?

A Well, we have five different shifts. We have the regular 8:00 to 4:00, 4:00 to 12:00, and 12:00 to 8:00, and

then we have an early and late. Early is from 6:00 to 2:00, and 2:00 to 10:00 is the late.

Q Who locks all these cells?

I believe you testified you don't have a central locking — or, do you have a central locking?

A No, we do not; individual.

Q How are they locked?

A By the officer.

Q And how are they opened?

A By the officer, individually.

Q Is one officer assigned to unlock and lock?

A Yes.

Q There's never two?

A The units are generally not staffed with two at that specific time. If there was an emergency count or something, there may be two on there, but not as a positional staffing. When they lock up, one officer does it.

Q But, at night, generally the inmates are locked down, so to speak?

A That's correct.

Q Now, what is the most common crime that an inmate assigned here has committed?

A Particularly in our pretrial group, the most common crime is bank robbery; second most common is narcotics.

Q Do you have any idea how many sex criminals or those accused of sex crimes are here?

A Very few. When you say — let's differentiate between a sexual deviant and people sent here for the commission of a sexual crime, if we can do that, because we have people here who are sexual deviates who, on this occasion, were not sent to us because of that specific type of crime.

Q Let's lump them all together, those who have had some experience with sex crime or sexual deviates. What kind of percentage do you have here?

A Very, very few. I would place it around no more than two percent.

Q And are they housed in any particular area?

A If they are identified as a very, very serious threat.

Q And where would they be housed?

A Either in our hospital or maximum security area.

Q Roughly two percent would be about how many out of your 247, four or five?

A Well, at any one time. But, our population turns over, so we get into a problem coming up with percentages.

Q But, usually not more than ten?

A No; not at any one time, no.

Q I want to ask you, then: If you had a population of roughly ten percent that had been convicted of some type of sex crime — I am talking about rape, sodomy, assault with intent to ravish, et cetera, involving sex — and they are allowed to roam free in dormitories, would that be a proper place to assign a lone female Correctional Officer or guard?

A If there was no effort to individually identify which presented a certain kind of risk, actual risk opposed to what they have been convicted of, yes, I would say that would constitute a problem because, in our situation here, we found such individuals who we have found constituted a problem and we isolated them where they had no contact with women officers or employees.

Q Regardless of whether or not they have been isolated, you do it by an overt action?

What I am trying to say, when you identify these people, do you identify them by an overt action or that they have made an overt action?

A Well, they may have made an overt action in the past. We look at their history.

Q There is always the possibility of sexual assault when you have a sex criminal, whether he has been identified

as a risk or not, is that correct?

A Same as there is a possibility of sexual assault with a person not convicted of a sex crime.

Q And with a ten percent population of persons who have been convicted of sex crimes, that are not isolated, have not been isolated, put in segregation or maximum security lockup, do you feel that that still would be an appropriate or inappropriate place for a woman?

A No; as you describe it, I would say that would be an inappropriate place.

Q Let me ask you this, then: Considering, of course, the premise that a male could be sexually assaulted, just as a female could be sexually assaulted, if female Correctional Officers were assigned to an all male institution, would the probability of sexual assault on a Correctional Officer be greater or would it be the same, or do you have any opinion?

A Are you saying would the probability of a sexual assault upon a female officer —

Q No, upon a guard. I am saying: Taking into consideration that a male guard could be sexually assaulted as well as a female guard —

A Yes.

Q — now, if you put female guards into an all male institution, would the probability of sexual assault on a guard be increased or would it remain the same, or do you have any opinion as to what effect it would have?

A There is a relevant point here, and that is the sex of the officer.

I have to answer from the standpoint that I would assume that the probability of sexual assault upon a male officer would remain the same, obviously.

I would say there would be a higher risk of sexual assault on the female officers, basically from the standpoint that in an all male institution a male officer doesn't present — there

is a surplus of other males, you might say, to engage in sexual activity with, so he doesn't present any particular value. The introduction of a woman officer does present another factor.

So, I would say it would increase the potential for sexual assault upon the woman officer.

Q Does the type of layout of an individual prison or penal institution dictate the type of security that should be maintained in that institution?

In other words, with a locked-down, single cell type institution, would the institutional security be maintained differently than if there was an open, large dormitory type situation?

A Yes.

Q Would the security be more for the dormitory situation or the single cell situation? Would the necessity for institutional security be more or less?

A The problem with coming up with a concrete answer to that is we have to get back to what kind of inmates do you have in these different facilities.

Normally, the dormitory is used for minimum custody type inmates, like we use for our immigration cases or for our community based or work release type inmates and, in those situations, there is less need for custody. That is why we use a dormitory, and there is no problem with security.

On the other hand, if you take a very aggressive type inmate and put him into a dormitory versus housing in a single cell, you have a greater security problem in dormitories.

Does that answer your question?

Q Yes, sir. I'm sorry, I did leave out about the type of inmate that you place into a dormitory type situation.

Do you have any opinion as to why you feel that the inmate's appearance, his physical appearance, his dress, his manners, have been raised in your institution with the input

of female Correctional Officers?

A Oh, yes. Inmates are human beings, and all human beings behave that way. When you are placed in a mixed social setting, both male and female members are very concerned about their appearance.

That is just a normal response of human beings, and it is a normal response for them.

Q Is that sexually related? I am not talking about overtly. What I am talking about is, if I can explain it, is what we say "trying to get next to the woman"?

A No, I think it is more of a subconscious reaction. It's very difficult to tell what motivates them, but we do notice, when a man comes out in the morning and there is a woman officers, he wants to check to see that his hair is combed and everything is looking right, and he probably does this when he goes into any place on the outside.

It is just a normal male reaction to the presence of women and a normal reaction of women to the presence of men.

Q Can you tell me how long the average inmate stays here, incarcerated in this facility?

A This is somewhat difficult because of the different categories we have, but, among the pretrial, it is approximately thirty-two days — again, that figure is somewhat misleading because we have a great number of those types that stay here only a few days and, again, another group that stay up to four or five months. Therefore, they produce an average which is not really indicative of the length of time that many of them stay.

With our persons serving sentence, they stay here for an average time of about a year.

Those individuals who are in work release stay for an average period of about four months.

Those in immigration and naturalization stay for an average period of forty-eight hours.

So, it is a complex bag of averages.

MR. DAVIS: Off the record.

(Discussion held off the record.)

MR. NEWMAN: Back on the record.

BY MR. NEWMAN:

Q Would the length of stay in an institution in which he has been deprived of female contact have any bearing on how a prisoner would react toward the introduction of a woman into that setting?

A From my experience, I would have to say no, because we get inmates here all the time from the penitentiaries and they have been incarcerated five, ten years, and they come here and they are confronted with a female Correctional Officer.

It is a novelty, but it has presented no problems.

Q Do you have any idea what percentage of those type prisoners you get here?

A Percentage? No. I would have to do some research on that. I have just encountered them in my tours around the facility.

Q Would it be few or many?

A I would say certainly it would be few compared to our population, yes.

Q Would it be — in other words, what — would your population be saturated with those type people? I mean —

A Would it be more than twenty-five percent or ten percent? I would say it would be less than ten percent. Would that be a way of expressing it?

Q Right. Thank you.

What I am trying to get at is: If you have a population of a hundred percent of these people, prisoners who have been or are assigned there for long periods of time, some sentences up to 120 years, and the entire population has been deprived of female contact for this period of time, would

that, in your opinion, have any effect upon the introduction of women into the prison?

A I think it would have an effect, but it would be very difficult to isolate this particular characteristic of the population and say it would have a bearing. You would have to take into consideration the total atmosphere.

Q Now, your women here don't conduct strip searches?

A They do not, no.

Q And the reason for that is you feel it would be a violation of the inmates' right to privacy or the Bureau of Prisons feels that way?

A Yes. I think, again, it is not acceptable, you might say, to the officer or to the inmate or to the public. I think we are at a point in our development where this is not an acceptable feature.

I think that would be exceeding the bounds of propriety and professionalism and would create unrest and uncomfortableness.

Q Would it be fair to say that your women here who are assigned as guards do not perform all the duties a male Correctional Officer has to do?

A It would be fair to say they perform all the duties with the exception of the male strip search, yes.

Q So, your male officers are performing extra duties?

A It balances off because the male officers do not strip search the women.

Q But, you only have three women here.

A That is today. We may be up to forty-four. That is our capacity, forty-four women.

Q When you have a farm operation — I believe you said you were familiar with a farm operation —

A Yes.

Q — the number of strip searches would be greater, wouldn't it, with the inmates coming in off the farm?

A Well, it's hard to make a comparison, obviously, between an urban high rise and a farm, but let us say we have a great deal of strip searching with our visiting because, every time they have visiting, they must come through a strip search afterwards.

So, there would be a relative comparison to our visiting function and coming back from farm detail.

Q How is that accomplished?

A The inmate comes out of the visiting room into a vestibule, where he then removes the clothing, and the officer inspects the clothing and the nude body.

Q What other occasions do you have for conducting strip searches?

A When the inmate is admitted to the institution.

Q Those are the two main —

A Yes.

Q You have how many officers assigned to this?

A For the visiting purposes, for example, when a unit is having visiting, which is — the pretrial is five days a week, from 2:30 in the afternoon until 9:00 — there will be a visiting officer assigned during that period who remains in the visiting room, and there will be another officer who is back in the unit, regular unit officer.

One of those officers is always a man, so the visiting room could be either way, but the male officer will do the strip search.

Q So, would it be fair to say a very small percentage of your officers are involved at any one time in conducting a strip search?

What I am saying is: You only have one officer that conducts a strip search during visiting?

A No, one in each. There is one in each of the functional units. Each of the functional units has a visiting unit with it.

Q Just a few more questions, Mr. Nelson.

I believe Ms. Horowitz asked you about physical strength, and it was not one of the prime factors or characteristics that a prison guard should have.

A For our facility, that is correct.

Q There are times, however, when physical strength is very important, is it not?

A That's correct.

Q And during those times, it is better to have physical strength than not to have physical strength, is that correct?

A Well, I would say you should have a sufficient number of officers available who are physically able to put down a disturbance or restrain an inmate. Yes, that's certainly important.

Q But, at those times, it is more important to have physical strength than not to have it?

A Very definitely.

Q Have you ever been familiar or are you familiar or ever worked in an institution where you had a hundred-man dormitory situation?

A Yes.

Q Have you ever been familiar with an institution where the bunks are stacked two together, four across?

A Yes.

Q Would or would not height be an advantage in that type of situation?

A I think the situation is that height would serve an advantage, but it is so infinitesimal in significance whether you have an officer that is six foot, two or whether you have an officer that is five foot, five.

The six foot, two officer has a great many advantages. On the other hand, the five foot, five officer may have the advantage of seeing under certain things in a double bunk bed.

In the assignment of male officers to dormitories of that type, there was never any determination made by his height or selecting him just to be assigned to those facilities. In that kind of a situation, it is more how you can deal with the inmates in the facility in a mental way than it is with what you can see, because the odds are against you as it is and, if you are an abrasive person, you can be seven foot tall and the odds are against you.

I might add that I worked personally with 400-men dormitories of that type of thing and I didn't feel I had much advantage with my height.

Q May I ask you this: Do you have any opinion as to whether or not there should be a cutoff anywhere as to height and weight? Is there a point where your size just becomes too small?

A Yes, I would certainly say that a person's physique relates to how effectively they can perform as a Correctional Officer. I think there's obvious degrees, but the difficulty comes in making an arbitrary cutoff.

As I say, we use the very general concept of a proportion of height to weight. Certainly, in your selection, capacity of a person applies. If a person is, let's say, four foot tall and weighs seventy-five pounds, there are other ways of eliminating that person from applying for the job as opposed to saying, "We will not accept anybody under five foot," or something of that type.

The Bureau of Prisons does not have a height or weight—an absolute restriction, and it has not hampered the Bureau of Prisons in selecting their officers or imposed any problem.

I think the greater problem is imposed when you have that specific cutoff and you have a person come in who is — let's say the cutoff is five, two and he comes in and is five foot, one and a half and has got everything, he or she has a lot of ability, and you can't take that person, but you can

take a person five foot, two and a half who doesn't have the same equipment.

I would say, in those kinds of choices, obviously, you are making a mistake to go by one inch or so. So, I would say we work very effectively without height or weight requirements.

Q One further hypothetical question: If you have two people — we will assume you have positions for females as well as males, but you have two people applying for the job and one of these people is five, ten, 180 pounds, well proportioned, and the other is five, two, 115 pounds, well proportioned, everything else, educational background, experience, you talk to them and they are both about the same, do you have a preference as to who you would pick?

A Yes, I'd say, everything being equal, I would take the better physically proportioned person.

Q The five, ten, 180 pounds?

A Yes.

MR. NEWMAN: That's all the questions I have.

MR FLACK: I have just a few questions.

EXAMINATION

BY MR. FLACK:

Q Do you have any people in this institution charged with murdering of females?

A Yes, we have had.

Q They have been placed in a lock-down situation?

A Yes, that's correct.

Q If an incident happened where one of your female officers was — if an attempted assault was made on her and then the inmate attempted suicide after this, would this have any bearing on your determination as to continue the program?

A No.

Q If, added to that, you had one of the female guards, right in about the same period of time, pinched by one of the inmates and, due to her wrath, she turned around and slapped him, would these two factors, added together, help in determining the program as to whether to have females — in other words, the prior incidents happening and then this happening, all in one period of time?

A I think we would try to deal with them on individual cases there. Again, you are isolating these kinds of situations out and, in isolation, I would say we have to deal with them as individual cases and it would not change our operation here any.

Q If, upon your inspection, going around, you noticed that female Correctional Officers were having to repeat themselves more often than males in giving orders or giving commands to inmates, would that have any bearing on it?

A Well, in going around, you see, that kind of a quality would be an individual characteristic, unrelated to sex.

In fact — I don't know if I should go on and expand on this answer, but we find a strange characteristic here, that the inmates are almost responding without command from the woman detail officer.

What I mean here is they have certain cleanup details to do and I have had an inmate express to me that they don't like to be nagged by a woman on cleanup detail, so, when it comes time, they get their work done so they won't be put in this position of having a woman telling them, "You clean that or that." And that is the actual experience we had in going around.

So, in specific response to your question, I think it is more in relation to individual attributes of officers, whether they have been men or women.

Q If you learned at about the same time these other aspects had happened that one of your female officers had

resigned and married one of the inmates, would that have an effect on your continuation of the program?

A No, because it would be handled as an individual case.

Q If, at the same time, you had a charge filed in Federal Court calling into dispute one of the female guard's sexual behavior — all these factors are happening within a short period of time —

A You will have to be more specific on the latter, Federal Court calling in dispute a guard's sexual behavior.

Q That is, the woman was not, say — let me rephrase the question.

Suppose you had a charge filed in Federal Court charging the woman with immoral and abnormal sexual behavior, and, for this reason, the female filed a disciplinary against him, because he was going to tell.

A Well, again, we would deal — should such a thing come up — with it as an individual case, whether it be male or female.

Q What I am talking about, if these had all happened within a short period of time or a period of time, would it have any effect as to your determination of how well females in general could function?

A I would say that if our experience with women was very unsatisfactory and we had a great many instances like this, under that situation I would say yes, we would certainly question our operation.

But, based on our experience. If these things began to happen, it would be something else.

Q In the policy statement put out by the Federal Bureau of Prisons, they made an exception of penitentiaries.

A That's correct.

Q Do you know any reason why they did that?

A Because of the structural design of these facilities; because of the types of inmates; because we wanted to gain

experience on the other types of institutions.

As I say, our experience is not totally complete. We need more experience with this and we should progress in the other institutions to where we have gained a greater body of knowledge.

But, our intention is to introduce women into the penitentiaries by 1978.

Q Do you have males working in the female units?

A Yes.

Q Inside the dormitories?

A Yes.

Q And they perform exactly the same type of functions as the females in the male units?

A That's correct.

Q Are the female units set up differently than the male units?

A The same; they are a forty-four room situation.

Q Then, both sexes would be involved in seeing each other use the commode?

A That's correct.

Q And showering?

A Showering is done privately, so that the inmate goes into an individual shower stall and locks the door behind him. You can unlock it from the outside with a key if you must go in, but he does this privately; no one observes him.

Q There is no visual contact?

A No.

There is an exception. On the maximum security floor the shower is so situated that the officer in the glassed-in control unit has full observation of the shower and, at times, this is a woman. And, when the woman is there and she is the only one to observe, she does observe in this situation.

Q Then, you consider it normal for females to observe naked males and males to observe naked females?

A No, it is not normal. It is only in the unusual circumstances you have to do that.

In other words—and I should emphasize this—if it became an emergency situation to strip search men, our women would do it. We don't consider that normal. We would only do it in an emergency situation. We would see nothing wrong in their doing it.

Q But, using the commode is normal—

A Yes.

Q —for a male to observe a female?

A In our setting, yes. We say that it is normal because it is not something that—you'd have to see our structure—well, for example, the doors to the cells are like the door we have here in my office and one may observe through that window as they walk by. The commode would be where the coat rack would be.

Q If you had exposed commodes, exposed right along—

A You mean a communal type situation?

Q Yes.

A We don't have those.

Q If you did, would you have women in the dormitories?

A No, I would have some problem with that, very definitely.

I think, in our setting, it works out very well. We had some questions about it originally, but as it developed it worked out very well.

Q In other words, the commodes are in the individual rooms?

A Yes.

Q Then, again, if it was a dormitory situation where there was communal bathing and communal urinals and communal commodes, you would recommend against women?

A Yes, that would present another problem that I would find rather difficult.

Q You have stated that four feet would be, in your opinion, too short. Would four foot, seven?

A I never saw a four foot Correctional Officer, so I just took that out of the air.

Q What about four foot, seven?

A Hypothetically, because somebody would prove me wrong, would show me a good four foot, seven when I haven't seen one, it is difficult to respond as to how many inches a person should be on that.

Q If you had an applicant that put down on her application — supposing that we did have a minimum standard, five foot, two, and then you found out she was four foot, seven, would you consider that a material fact in rejecting her?

A Well, we would be concerned about the falsification of an application in that respect, certainly, but, as I say, we are concerned about general — about their physical ability to perform and, if a person of that height represents a physical problem, that would be part of the overall concerns in selecting them.

Q Do you say an average of one female guard out of seven guards in an all male facility would be sufficient?

A One out of seven?

Q Yes, approximately fourteen percent.

A That percentage has worked out fairly good for us, yes. I would say that would be a good percentage, but it depends upon your experience. I really don't know what the best percentage is.

As I say, with our twelve officers here, or thirteen officers — of the Correctional Officers, let's say, we had fifty-six and the twelve ratio works out fine for us.

Now, would fifteen and fifty-six work out? I don't know until we find this out. I don't think I have enough information or knowledge to say, and it also depends, I am sure,

upon the type of facility you are operating.

So, I couldn't really come up with a good answer to your question.

Q Is the Correctional Officer that is stationed in an all male dormitory — what rest room facilities does she use?

A Well, there is a washroom on each unit for the officer, and she uses that washroom facility. In fact, there are no washrooms in the area designated for men or women in this facility.

MR. FLACK: I have no more questions.

MS. HOROWITZ: I have just a few more.

EXAMINATION

BY MS. HOROWITZ:

Q How often are head counts conducted within this facility?

A Five times a day.

Q I believe you testified on cross examination that the cells are locked from 10:00 at night to 6:00 in the morning, is that correct?

A Yes.

Q Is a head count conducted during that time period?

A Yes, that's correct.

Q So, if there is a female officer in that unit, she would go in and do the head count, is that right?

A Yes.

Q And also, I would like to ask you to expand a little further on your response with respect to the situation where there is communal bathing and commodes.

Would this mean you would advocate a policy whereby women were excluded from working in that facility at all, or would you treat this, as you have the strip search situation here, and make that a restriction on the women who are employed?

A I find some difficulty in responding, because we are responding to a hypothetical situation.

Hopefully, I would like to more physically rearrange the communal type toilet facilities. We have open dormitories and we have facilities there, you might say communal or central type facilities, but they are partitioned off, which allows for privacy.

I would say I have worked with dormitories where they are the open type facilities and I would find that very difficult, for a women officer to work in there.

I don't know if I answered that question.

Q Let me ask you this way: From the standpoint of good prison administration, so you are not sacrificing good prison administration, is it, in your experience, possible to restrict the duties of the women, as your situation with respect to strip searches, and still utilize women so they perform an effective function within the institution?

A Yes.

Q Do you think the inmate's length of stay in a facility is relevant in terms of the difficulty of the guard's job?

A Well, not if you specifically say "length of stay." Generally, length of stay is related to his aggressivity, his personality—for example, murderers primarily have the longest length of stay and, as a group, are probably your best prisoners, in a generality.

Also, kidnappers, robbers, and some of your most vicious offenders normally have a long stay. So, it is very difficult to attach length of time as the only factor.

Q Is it relevant, though, with respect to length of stay, that a guard, for example, does not get to know a prisoner who is only there thirty days and he or she would get to know a prisoner who had been there a year or two?

A I don't know. I have not had that experience.

As I say, we have only been operational six months, so

these prolonged relationships I have not had experience with.

Q How about facilities where you worked previously, where you just had male guards?

A To what factor, dangerousness?

Q And ability to maintain security. Is there any advantage to the guard in being able to observe and know an inmate over some period of time?

A Oh, yes, there is a definite advantage.

Q What is that advantage?

A The advantage is you are more aware of his background; you are more aware of what his potential would be. Maybe you have even developed a relationship with him that is very helpful in your work.

But, when a person is here for a short period of time, is somewhat of an unknown, you have not developed a relationship and you don't know what they are capable of doing, so there is a problem there.

Q In response to some of the hypotheticals Mr. Newman posed, several of them went to the fact that a given class of inmates were not isolated from other inmates — specifically, I think he gave an example of mentally disturbed inmates and also the example of inmates with a known propensity for violence.

Now, would you say that with respect to the utilization of women an appropriate classification system makes a big difference?

A Very definitely, yes.

Q And would you say, relatively speaking, that would be a crucial factor in determining to what extent — whether and to what extent you were going to utilize women?

A I would say yes, that it is a major factor how effectively women could be utilized.

Q And if you did have a classification system, then, from the standpoint of prison administration, it would be

possibly prudent to not assign women to certain areas within that prison based on the classification of mentally disturbed prisoners, but to use them within your other classifications?

A Yes. I don't want to say that women can't effectively work with mentally disturbed prisoners.

Q You are not saying they can't?

A No. In fact, they might be more effective in working with mentally disturbed prisoners than male officers. That gets down to a specific type of mental disturbance.

But, if you have a person very mentally disturbed, particularly toward women, in his relationship to women, and has assaulted women, like we have had here, with a very heinous type offender who is against women, if we ever placed that man in a position where he would get at a woman, it would be very difficult for us to continue our program or very difficult to justify our placement of this man, where we know his background and his relationship with women.

And, to place him in a position where he could assault a woman, I think, would be negligence on our part.

Q So, your solution to that would be not to abolish the program of using women but to isolate him from the rest of the prisoners?

A That's right.

Q One last question: I believe that you said in cross examination that your opinions expressed about women were not based just on your experience here at the Metropolitan Correctional facility, but also your knowledge of experience in other federal facilities.

A Of my contemporaries, yes.

Q Could you tell me which facilities?

A Metropolitan Correctional Center in San Diego and Metropolitan Correctional Center in New York City.

I specifically, about a month or so ago, called the Wardens and asked them their reaction and experience, and they all

said it was very positive and they experienced the same thing I had and they had no untoward incidents to reconsider their position on it, that they had many positive influences.

Q So far as you know, there have not been any negative experiences with respect to the utilization of women within the federal system?

A To my knowledge, there have not been.

MS. HOROWITZ: I have nothing further.

EXAMINATION

BY MR. NEWMAN:

Q Are these other two institutions similar to yours?

A Yes, they are.

Q Set up about the same way?

A Yes, they are all urban high rises and have the same function.

Q Same type inmates?

A Yes.

Q Ms. Horowitz stated that if you segregate those that have a sexual, violent propensity toward women that it might possibly be — women might possibly satisfactorily work out in a male institution.

Let's put this the other way around: Here you have an inmate that has not shown any propensity toward sexual violence or violence toward a male guard. Now, wouldn't it be kind of unfair to inject a female into his life and then have to take him out and put him into an isolation unit? Wouldn't that be unfair to him?

A You mean unfair to the inmate?

Q Yes.

A No. Every person has an obligation to treat a fellow man civilly and without violence, and the fact that a male inmate is confronted by a women and assaults her, I don't think that is unfair to him. I think he has that obligation.

Q Considering he is doing a good job in all other things, his work record is real good, he is getting along real well in the prison with male guards?

A Sure. The man is theoretically going to be released some day.

Q Would it be your testimony that until a prison system has an effective classification system that you would not advise the use of female guards in male institutions?

A I would prefer to say I have some reservations about the utilization of women officers in a correctional institution that does not have a fairly effective classification system, yes.

Q There has been testimony in this case so far that — and, of course, there's been a court decision that said four major institutions in Alabama are woefully understaffed; in fact, they are grossly understaffed.

The four major institutions in the State of Alabama are primarily dormitory arrangements, large open dormitory arrangements, where you have got the front, then you have the back, the back being the dormitories, the front being the offices.

Now, correct me if I am wrong, Pam, but, in your question to Mr. Nelson, you stated that there are positions that women can handle, possibly handle, in this type of situation; in other words, separate certain jobs by male and female.

What I am getting at, when you are woefully understaffed — and I use "woefully" because that is the way the court used it — you've got your dormitories, your open dormitories, and that's where you need your guards, in the open dormitories, to try to cut out of this violence.

Would you suggest that the State, when they start being able to start hiring guards, when they have the funds to start hiring guards, start hiring women or start hiring men guards to go back there in the back of the dormitories, the overcrowded dormitories with the open facilities, bathroom facili-

ties, the communal showers, communal bathroom facilities?

I mean, doesn't the restricting of the female guards from going back in these dormitories and conducting strip searches — it seems like you are taking out a lot of things that guards need to be doing.

A I would have a difficult time answering that question concretely.

As you set up the program as you described, it would sound very unadvisable to use female officers in that setting.

If you are setting up a situation of trying to normalize or reform the prisons that you have set up, then you may want to introduce women.

But, I can't sit up here, a thousand miles away, and project what you would want to do or could do in Alabama. I can really only get direct answers on my own experience in a very ideal setting.

MR. NEWMAN: That's all the questions I have.

MS. HOROWITZ: Mr. Nelson, do you wish to waive your signature to this deposition?

THE WITNESS: No, I do not wish to waive it.

FURTHER DEPONENT SAITH NOT.

[Dep 75 to 76]

Caption omitted*

ANSWER OF DEFENDANTS
ALABAMA BOARD OF CORRECTIONS,
THOMAS F. STATON, REV. J. VICKERS,
THOMAS F. BRADFORD, MARION CARROLL, JR., AND
JUDSON LOCKE

For answer to the complaint, as amended, the above defendants say as follows:

1. Defendants deny that jurisdictional allegations contained in Section II of the complaint, as amended.

2. Defendants deny the class action allegations contained in Section III of the complaint, as amended.

3. Defendants admit the allegations contained in Paragraphs 1 and 2 of Section IV A. (Parties, Plaintiffs) of the complaint, as amended.

4. Defendants admit the allegations contained in Paragraphs 2, 3, and 4 of Section IV B. (Parties, Defendants) of the complaint, as amended, except that as of the date of this answer Defendant Bradford is no longer a member of the Alabama Board of Corrections.

As to the remaining allegations contained in Section IV B. (Parties, Defendants) of the complaint as amended, these defendants have insufficient information to either admit or deny, therefore, all remaining allegations in Section IV B. are denied.

5. Defendants have insufficient knowledge or information to either admit or deny the allegations contained in Section V A., (Facts, Plaintiff Mieth) of the complaint, as amended, therefore, they are denied.

6. Defendants admit the allegations contained in the paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 of Section V B. (Facts, Plaintiff Rawlinson) of the complaint, as amended.

Defendants deny paragraph 10 and 11 of Section V B. of the complaint as amended in their entirety.

7. Defendants admit paragraphs 1 and 2 of Section VI (First Cause of Action) of the complaint, as amended. Defendants deny each and every other material allegation contained in Section VI of the complaint as amended.

8. Defendants deny each and every material allegation contained in Section VII, (Second Cause of Action) of the complaint, as amended, heretofore not previously admitted.

9. Defendants deny each and every material allegation contained in Section VIII (Third Cause of Action), IX (Fourth Cause of Action), and X (Fifth Cause of Action) of the complaint, as amended.

AFFIRMATIVE DEFENSES

AND NOW, HAVING FULLY ANSWERED the allegations of the complaint, as amended, these defendants hereby give notice that at, or prior to, the trial of this cause, they will assert the following affirmative matters:

1.

That there is a bona fide occupational qualification as to women being employed in a contact position as a Correctional Counselor and/or Officer in an all male institution in the Alabama Prison System that is reasonably necessary in the normal operation of the Alabama Prison System.

2.

That there is reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

3.

Notwithstanding anything set forth hereinabove, by way of allegation, averment, answer or denial, these defendants expressly deny any and all allegations of whatever sort or nature of the complaint and/or any of the causes of action, if any, stated in the complaint, which, if proved, may in any way be construed to impose liability upon these defendants to plaintiff, or to any other party in this action.

Respectfully submitted,
WILLIAM J. BAXLEY
BY:

250 Administrative Bldg.
Montgomery, Ala. 36104
LARRY R. NEWMAN
ASSISTANT ATTORNEY GENERAL
101 S. Union Street
Montgomery, Ala. 36130

DAVID G. FLACK
ATTORNEY FOR THE BOARD
OF CORRECTIONS
*Certificate of Service Omitted
Caption Omitted

OFFER OF EVIDENCE

Comes now the Defendant, Board of Corrections and offers the following evidence in the above styled cause:

1. Deposition of Tony Sewell
2. Deposition of Bill Gilmore
3. Deposition of Judson C. Locke
4. Deposition of Ray Nelson

RESPECTFULLY SUBMITTED,
WILLIAM J. BAXLEY
ATTORNEY GENERAL
BY:
LARRY R. NEWMAN
ASSISTANT GENERAL GENERAL
COUNSEL FOR DEFENDANTS
*Certificate of Service Omitted
Caption Omitted

PLAINTIFFS' OFFER OF EVIDENCE

Plaintiffs offer into evidence the following:

1. Plaintiffs Interrogatories of February 3, 1976, to Defendants E. C. Dothard and Stanley Frazer and their Answers dated February 19, 1976. (Exhibit 1)

2. The following document provided by Defendants E. C. Dothard and Stanley Frazer in response to plaintiffs' Request for Production of Documents of February 3, 1976:

   a. Announcement of Continuous Merit Examination for the position of State Trooper. No. 7221 (Exhibit 2)

3. Plaintiffs' Interrogatories to Defendants Judson C.

Locke and Stanley Frazer of February 3, 1976 and their Answers dated February 17, 1976. (Exhibit 3)

4. The following documents provided by Defendants Judson Locke and Stanley Frazer in response to Plaintiffs' Request for Production of Documents of February 3, 1976:

a. Correctional Counselor Trainee job description. (Exhibit 4)

b. Correctional Counselor I job description. (Exhibit 5)

c. Correctional Officer job description. (Exhibit 6)

d. Correctional Officer I (Female) job description. (Exhibit 7)

e. Administrative Regulation Number 204 of the Board of Corrections (Exhibit 8)

f. Syllabus for the Correctional Curriculum of the 240 hours of Minimum Standards Training as required by Alabama Act No. 1981 (Reg. Session 1971). (Exhibit 9)

g. Syllabus for the General Law Enforcement Curriculum of the 240 hours of Minimum Standards Training as required by Alabama Act No. 1981 (Reg. Session 1971). (Exhibit 10)

5. Deposition of Robert Sarver taken on February 16, 1976. (Exhibit 11)

6. Deposition of Peter Bloch taken on February 23, 1976 and exhibits attached thereto. (Exhibit 12)

7. Deposition of Thomas White taken on February 23, 1976 and exhibits attached thereto. (Exhibit 13)

8. Deposition of E. C. Dothard taken on March 3, 1976 and exhibits attached thereto. (Exhibit 14)

9. Deposition of Judson C. Locke taken on March 3, 1976 and exhibits attached thereto. (Exhibit 15)

10. Deposition of James C. Jackson taken on March 3, 1976 and exhibits attached thereto. (Exhibit 16)

11. Deposition of Diane K. Rawlinson taken on March 8, 1976 and exhibits attached thereto. (Exhibit 17)

12. Deposition of Brenda M. Mieth taken on March 8, 1976 and exhibits attached thereto. (Exhibit 18)

13. Deposition of Ray Nelson taken on March 19, 1976. (Exhibit 19)

14. Deposition of Richard Lyles taken on March 22, 1976 and exhibits attached thereto. (Exhibit 20)

15. Right-to-sue letter issued by the United States Dept. of Justice to Diane K. Rawlinson. (Exhibit 21) (See Attachment A)

16. Affidavit of Brenda M. Mieth dated March 30, 1976. (Exhibit 22) (See Attachment B)

17. Affidavit of Diane K. Rawlinson dated March 31, 1976. (Exhibit 23) (See attachment C)

Respectfully submitted,

JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES
1001 S. Hull Street
Montgomery, AL 36104
ATTORNEYS FOR PLAINTIFFS

*Certificate of Service Omitted

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

JSP:HAG:ljt
AIR MAIL
Ms. Dianne K. Rawlinson
c/o John L. Carroll, Esquire
Staff Attorney
Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36101

Re: EEOC Charge Against State of Alabama
(Personnel Department)
NO. TB15-0530

Dear Ms. Rawlinson:

Because you have filed a charge against the respondent named above and more than 180 days have elapsed since the Equal Employment Opportunity Commission assumed jurisdiction over the charge, and no suit based on that charge has been filed by this Department, and since you through your attorney have specifically requested this notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seg., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this notice.

Your attorney may inspect the investigative file pertaining to the case at a time and place convenient to the parties. That file is located in the EEOC District Office, 2121 8th Avenue, North, Birmingham, Alabama 35203.

We request that you send this Department a copy of any

complaint initiating suit.

This Notice should not be taken to mean that an agency of the United States has made a judgment as to whether or not your charge is meritorious.

Sincerely,
J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division
By:
HERBERT A. COLDENMUTH, JR.
Attorney
Employment Section

cc. Ms. Evelyn Palkowski
District Director
Birmingham District Office
Equal Employment Opportunity
Commission
2121 8th Avenue, North
Birmingham, Alabama 35203

Caption omitted

AFFIDAVIT OF BRENDA M. MIETH

My name is Brenda M. Mieth. I am a resident of the State of Alabama and over the age of 21. Since my application for employment with the Alabama Department of Public Safety was rejected, I have sought employment with several other law enforcement agencies, among them the Prince William County, Virginia, Police Department, the Prince George's County, Maryland, Police Department and the Maryland State Police. Although I have applied with these agencies, I have not yet been employed by any of them. I have also contacted the Mobile, Alabama, Police Department and they indicated that they were not interested in my application. Since the first of March, I have been employed by Phillipsborn, Inc., of Forestville, Maryland. I am utilized in a security position and I make $3.00 per hour. This particular job is my first employment since my rejection by the Alabama Department of Public Safety.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at large, personally appeared Brenda M. Mieth, who, being duly sworn, deposes and says that she has read the foregoing affidavit and it is true and correct, to the best of her information, knowledge and belief.

BRENDA M. MIETH

SWORN TO AND SUBSCRIBED before me
on this 30th day of March, 1976.

Jackie Alexander
Notary Public

Caption omitted

AFFIDAVIT OF DIANE K. RAWLINSON

My name is Diane K. Rawlinson. I am a resident of the State of Alabama and over the age of 21. My application for employment with the Board of Corrections was rejected in October of 1974. In December of 1974, I received my degree in Correctional Psychology from the University of Alabama. From December of 1974 to February of 1975, I was employed by the Pizza Hut in Tuscaloosa, Alabama, making $1.50 per hour. From February of 1975 to July of 1975, I was employed as a clerk at Adrian's, dress shop in Tuscaloosa. I made $2.10 per hour there. From July 1975 to March 15, 1976, I was employed as a shampooer at the Kut Above which is a hair cutting salon in Montgomery at $100.00 per week. For the past week and a half, I have been employed by the Department of Youth Services at their D & E Center as a student aid.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at large, personally appeared Diane K. Rawlinson, who, being duly sworn, deposes and says that she has read the foregoing affidavit and it is true and correct, to the best of her information, knowledge and belief.

DIANE K. RAWLINSON

SWORN TO AND SUBSCRIBED before me
on this 31st. day of March, 1976.

Jackie Alexander
Notary Public

Caption omitted

PLAINTIFF'S MOTION FOR JUDICIAL NOTICE

Plaintiffs move this Court in its consideration of this case to take judicial notice of the following:

1. 1970 Census. General Social and Economic Characteristics, Alabama. Table 46. (Attached as Exhibit A)
2. Alabama Act No. 1981 (Reg. Sess. 1971). (Attached as Exhibit B)

Respectively submitted.

JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES
1001 S. Hull Street
Montgomery, AL 36104
ATTORNEYS FOR PLAINTIFFS

Certificate of Service omitted

Table 46. Educational Attainment and Labor Force Characteristics by Race: 1970 and 1960.

(Data based on sample, see text. For minimum base for derrived figures (percent, median, etc.) and meaning of symbols see text)

The State	1970			Percent			1960			Percent		
	Total	White	Negro and other races	Total	White	Negro and other races	Total	White	Negro and other races	Total	White	Negro and other races
HOURS OF SCHOOL COMPLETED												
Total persons, 25 years old and over	1 808 798	1 399 206	409 592	100.0	100.0	100.0	1 669 871	1 232 258	437 613	100.0	100.0	100.0
No. school years completed	43 786	17 906	25 880	2.4	1.3	6.3	58 630	20 008	38 567	3.5	1.6	8.8
Elementary: 1 to 4 years	150 178	71 128	79 050	8.3	5.1	19.3	214 331	95 288	119 043	12.8	7.7	24.2
5 and 6 years	193 048	126 377	66 671	10.7	9.0	16.3	230 855	147 015	83 837	13.8	11.9	19.2
7 years	118 294	88 809	29 485	6.5	6.3	7.2	139 602	103 773	35 829	8.4	8.4	8.2
8 years	160 414	125 674	34 740	8.9	9.0	8.5	180 223	140 838	39 385	10.8	11.4	9.2
High school: 1 to 3 years	396 536	311 189	85 397	21.9	22.2	20.8	339 723	274 920	64 803	20.3	22.3	14.8
4 years	468-269	410 306	57 963	25.9	29.3	14.2	310 175	276 526	33 649	18.6	22.4	7.2
College: 1 to 3 years	136 287	122 714	13 573	7.5	8.8	3.3	101 201	91 522	9 679	6.1	7.4	2.2
4 years	92 949	81 758	11 190	5.1	5.8	2.7	65 221	55 798	9 423	3.9	4.5	2.2
5 years or more	48 988	43 345	5 643	2.7	3.1	1.4	29 910	26 512	3 398	1.8	2.2	0.8
Median school years completed	10.8	11.6	8.1	—	—	—	9.1	10.2	6.5	—	—	—
EMPLOYMENT STATUS												
Male, 14 years old and over	1 160 582	907 004	273 578	100.0	100.0	100.0	1 059 609	780 009	279 600	100.0	100.0	100.0
Labor force	815 543	656 342	159 201	69.1	72.4	58.2	779 335	591 537	187 818	73.6	75.8	67.2
Armed Forces	30 718	27 566	3,152	2.6	3.0	1.2	21 169	19 903	1 266	2.0	2.6	0.5
Civilian labor force	784 825	628 776	156 049	66.5	69.3	57.0	758 186	571 634	186 552	71.6	73.3	66.7
Employed	756 183	609 131	147 052	64.1	67.2	53.8	715 747	545 745	170 002	67.5	70.0	60.8
Unemployed	28 642	19 645	8 997	2.4	2.2	3.3	42 439	25 889	16 550	4.0	3.3	5.9
Not in labor force	365 039	250 662	114 377	30.9	27.6	41.8	280 472	188 472	91 782	26.4	24.2	32.7
Female, 14 years old and over	1 316 403	985 690	332 713	100.0	100.0	100.0	1 157 899	828 533	329 366	100.0	100.0	100.0
Labor force	476 903	353 758	123 045	36.2	35.9	37.0	373 381	249 753	123 628	32.2	30.1	37.5
Employed	445 766	334-828	110 938	33.8	34.0	33.3	350 150	236 077	114 073	30.2	28.5	34.6
Unemployed	28 417	16 926	11 491	2.2	1.7	3.5	21 639	12 251	9 388	1.9	1.5	2.9
Not in labor force	841 600	631 932	209 668	63 8	64 1	63.0	784 518	578 780	205 738	67.8	69.9	62.5
LABOR FORCE PARTICIPATING BY AGE												
Male: 14 and 15 years	7 131	5 338	1 793	9.2	10.2	7.1	7 876	4 927	2 949	12.7	11.9	14.2
16 and 17 years	20 429	15 772	4 657	26.2	32.3	19.8	19 706	13 602	6 104	31.7	33.4	30.3
18 and 19 years	33 537	25 240	8 297	54.2	57.2	46.7	27 629	19 352	8 277	58.9	60.6	55.2
20 to 24 years	104 558	83 573	20 985	80.9	82.6	74.5	83 562	61 295	22 267	84.5	85.9	80.8
25 to 34 years	183 648	152 126	31 522	93.8	95.1	85.3	177 097	139 094	38 003	93.5	95.2	87.7
35 to 44 years	169 621	138 708	30 913	93.0	94.4	87.2	179 926	141 640	38 286	93.8	95.1	89.1
45 to 64 years	267 284	213 184	54 100	82.2	83.9	76.3	251 315	189 506	61 809	85.8	87.2	81.7
65 years and over	29 335	22 401	6 934	21.6	22.6	18.9	32 244	22 121	10 123	28.0	27.4	29.6
Female: 14 and 15 years	2 730	1 926	804	3.7	3.9	3.2	2 717	1 542	1 175	4.5	4.0	5.7
16 and 17 years	8 207	6 288	1 919	11.8	13.6	8.3	8 445	5 662	2 786	14.0	14.0	14.0
18 and 19 years	22 062	16 931	5 131	34.6	37.9	26.7	17 702	13 007	4 695	35.4	38.4	29.0
20 to 24 years	71 244	54 328	16 916	50.3	50.7	49.1	44 483	31 149	13 334	41.4	40.9	42.7
25 to 34 years	95 878	71 961	26 917	46.7	43.5	58.0	79 485	52 867	26 618	37.8	34.3	47.5
35 to 44 years	102 749	76 038	26 711	51.1	49.4	56.8	91 690	61 785	29 905	43.4	39.7	53.8
45 to 64 years	155 863	115 833	40 030	42.6	41.6	45.7	117 608	77 034	40 574	37.1	33.7	45.8
65 years and over	15 070	10 453	4 617	7.9	7.4	9.3	11 248	6 707	4 541	7.9	6.9	11.0

WEEKS WORKED												
Total persons, 14 years and over	2 498 965	1 892 694	606 291	100.0	100.0	100.0	2 217 508	1 668 542	608 966	100.0	100.0	100.0
Worked in previous year	1 435 915	1 120 814	315 101	57.5	59.2	52.0	1 277 720	924 283	353 437	57.6	57.5	58.0
50 to 52 weeks	851 324	697 528	153 796	34.1	36.9	25.4	679 245	529 919	149 326	30.6	32.9	24.5
48 and 49 weeks	76 473	53 140	23 333	3.1	2.8	3.8	65 485	44 242	21 243	3.0	2.8	3.5
40 to 47 weeks	112 064	79 073	32 991	4.5	4.2	5.4	116 295	77 131	39 164	5.2	4.8	6.4
27 to 39 weeks	128 312	93 163	35 149	5.1	4.9	5.8	150 449	98 888	51 561	6.8	6.1	8.5
14 to 26 weeks	111 548	84 845	26 703	4.5	4.5	4.4	118 909	77 361	41 539	5.4	4.8	6.8
25 weeks or less	156 194	113 065	43 129	6.3	6.0	7.1	147 346	96 742	50 604	6.6	6.0	8.3
Did not work in previous year	1 063 670	771 880	291 190	42.5	40.8	48.0	939 788	684 259	255 529	42.4	42.5	42.0
MAJOR OCCUPATION GROUP												
Male employed, 14 years old and over	756 183	609 131	147 052	100.0	100.0	100.0	795 747	(NA)	(NA)	100.0	(NA)	(NA)
Professional, technical, & kindred workers	79 019	73 762	5 257	10.4	12.1	3.6	52 204	(NA)	(NA)	7.3	(NA)	(NA)
Managers & administrators, except farm	74 192	71 228	2 964	9.8	11.7	2.0	70 620	(NA)	(NA)	9.9	(NA)	(NA)
Sales workers	46 708	45 207	1 501	6.2	7.4	1.0	42 439	(NA)	(NA)	5.9	(NA)	(NA)
Clerical and kindred workers	43 902	38 772	5 130	5.8	6.4	3.5	36 752	(NA)	(NA)	5.1	(NA)	(NA)
Craftsmen, foremen, and kindred workers	163 670	144 711	18 959	21.6	23.8	12.9	139 757	(NA)	(NA)	19.5	(NA)	(NA)
Operatives, except transport	113 677	85 032	28 645	15.0	14.0	19.5	101 596	(NA)	(NA)	14.2	(NA)	(NA)
Transport equipment operatives	50 229	36 050	14 179	6.6	5.9	9.6	49 691	(NA)	(NA)	6.9	(NA)	(NA)
Laborers, except farm	63 634	33 001	30 633	8.4	5.4	20.8	76 377	(NA)	(NA)	10.7	(NA)	(NA)
Farmers and farm managers	17 957	15 453	2 504	2.4	2.5	1.7	57 491	(NA)	(NA)	8.0	(NA)	(NA)
Farm laborers and foremen	14 574	8 168	6 466	1.9	1.3	4.4	31 620	(NA)	(NA)	4.4	(NA)	(NA)
Service workers, except private household	46 818	28 735	18 081	6.2	4.7	12.3	38 656	(NA)	(NA)	5.4	(NA)	(NA)
Private household workers	1 192	188	1 004	0.2	—	0.7	1 365	(NA)	(NA)	0.2	(NA)	(NA)
Occupation not reported	40 613	28 884	11 729	5.4	4.7	8.0	17 179	(NA)	(NA)	2.4	(NA)	(NA)
Female employed, 14 years old and over	445 766	334 828	110 930	100.0	100.0	100.0	350 150	(NA)	(NA)	100.0	(NA)	(NA)
Professional, technical & kindred workers	62 781	50 040	12 741	14.1	14.9	11.5	41 417	(NA)	(NA)	11.8	(NA)	(NA)
Managers & administrators, except farm	16 143	15 005	1 138	3.6	4.5	1.0	13 868	(NA)	(NA)	4.0	(NA)	(NA)
Sales workers	27 843	25 955	1 888	6.2	7.8	1.7	25 220	(NA)	(NA)	7.2	(NA)	(NA)
Clerical and kindred workers	115 772	108 154	7 618	26.0	32.3	6.9	74 167	(NA)	(NA)	21.2	(NA)	(NA)
Craftsmen, foremen, and kindred workers	8 445	7 113	1 332	1.9	2.1	1.2	3 664	(NA)	(NA)	1.0	(NA)	(NA)
Operatives, except transport	76 302	60 342	15 960	17.1	18.0	14.4	54 972	(NA)	(NA)	15.7	(NA)	(NA)
Transport equipment operatives	1 973	1 556	417	0.4	0.5	0.4	626	(NA)	(NA)	0.2	(NA)	(NA)
Laborers, except farm	4 691	3 074	1 617	1.1	0.9	1.5	2 710	(NA)	(NA)	0.8	(NA)	(NA)
Farmers and farm managers	1 223	1 041	182	0.3	0.3	0.2	3 565	(NA)	(NA)	1.0	(NA)	(NA)
Farm laborers and foremen	2 515	1 508	1 007	0.6	0.5	0.9	5 172	(NA)	(NA)	1.5	(NA)	(NA)
Service workers, except private household	64 115	37 898	26 217	14.4	11.3	23.6	47 317	(NA)	(NA)	13.5	(NA)	(NA)
Private household workers	37 890	5 045	32 845	8.5	1.5	29.6	65 812	(NA)	(NA)	18.8	(NA)	(NA)
Occupation not reported	26 072	18 097	7 976	5.8	5.4	7.2	11 639	(NA)	(NA)	3.3	(NA)	(NA)

EXHIBIT "B"

Each Probate Judge, Sheriff, and the Clerk and Register of the Circuit Court is required by law to preserve this slip or pamphlet in a book kept in his office until the Act is published in permanent form.

ALABAMA LAW

(Regular Session, 1971)

Act No. 1981 H. 732—Hobbie, Culver, Downing, Bank, Robertson, Parker (T), Taylor, Harris, Jones (F), Jackson, Straiton, Headley, Ellis, Stubbs, Stewart, Perloff, Collins, Wood, Roberts, Stokes, Lang, Hearn, Waldrop, Timmons, Wallace, Jones (E), Bowers, Boles, Burgess, Falkenburg, Flippo, Hill, Doss, McBride, Weeks, Boutwell, Callahan

AN ACT

To establish the Alabama Peace Officers Standards and Training Commission; to prescribe its functions, duties and powers relating to the selection, recruitment and training of law enforcement officers and the work of law enforcement agencies in the State; to prescribe minimum standards for law enforcement officers; to grant to the Commission power to establish standards and issue and promulgate rules and regulations; to make the violation of certain provisions of this Act or the standards, rules and regulations of the Commission a misdemeanor; to establish the Alabama Peace Officers Standards and Training Commission Fund to make biennial appropriations from such Fund to the Commission for the fiscal years 1971-72 and 1972-73; to authorize patri-

cipation in the program of the Commission by State, county and municipal law enforcement agencies.

Be It Enacted by the Legislature of Alabama:

Section 1. Definition of Terms. As used in this Act, the following words and phrases shall have the following meanings respectively unless the context clearly indicates the contrary:

"Fund" means the Alabama Peace Officers Standards and Training Fund provided for in Section 9 of this Act.

"Commission" means the Alabama Peace Officers Standards and Training Fund established by this Act.

"Law Enforcement Agency" means and includes the State Department of Public Safety, the police department of each incorporated city or town, the department of each sheriff of the State, including all deputy sheriffs, the enforcement division of the State Department of Conservation and each public agency in the State charged with the enforcement of any laws and the officers or employees of which have power as such officials or employees to make arrests. It does not include the National Guard or any military organization.

"Law Enforcement Officer" means and includes a policeman, deputy sheriff, deputy constable, and other official who has authority as such official to make arrests. It includes Alabama State troopers or members of the State Department of Public Safety.

"State" means the State of Alabama.

Section 2. The Commission Created; Membership. The Alabama Peace Officers Standards and Training Commission is hereby created. The Commission shall consist of seven members, each of whom must be a qualified elector of the State who is over the age of 21 years. The State Fraternal Order of Police shall designate one member of the Commission to serve for a term of four years; the Alabama Peace Officers Association shall designate one member to serve for

a term of four years; the Law Enforcement Planning Association shall designate one member to serve for a term of four years; and the Governor shall designate four members of the Commission. The members appointed by the Governor shall each serve for terms of four years; provided that the members first appointed by the Governor shall serve for terms of one, two, three and four years, respectively, as the Governor shall designate. The members may adopt by-laws to govern the organization of the Commission, its meetings and activities, provided that the by-laws shall not conflict with this Act.

Section 3. Officers and Employees of the Commission. The Commission shall elect a Chairman and a Vice Chairman from among its members. The Commission may employ an Executive Secretary and such clerical assistants as it functions and duties may require, subject to the provisions of the State Merit System Act.

Section 4. Meetings of the Commission; Seal. The Commission shall meet in regular session quarterly at a time and place in the State of Alabama to be designated in its by-laws. Special meetings may be called by the Chairman, the Vice Chairman or any three members by giving notice of the time, place and purposes of such special meeting at least five days before it is to be held, to each member of the Commission. Such notice may be waived by all members of the Commission, either before or after a special meeting. The Commission shall adopt an official seal and the Executive Secretary shall be custodian of the seal and shall have authority to affix the seal to agreements and obligations of the Commission and to certified copies of proceedings of the Commission.

Section 5. Expenses of Members of Commission. Members of the Commission shall receive no compensation but may be reimbursed for their actual and necessary travel and other expenses incurred in the performance of their duties

but reimbursement for expenses shall not exceed $30 per day for each member.

Section 6. Functions and Duties of the Commission. The Commission shall have the following functions and duties together with all powers necessary or convenient for the performance thereof:

(a) To study, obtain data, statistics, and information and make reports concerning the recruitment, selection and training of law enforcement officers in the State; to make recommendations for improvement in methods of recruitment, selection and training of law enforcement officers;

(b) To review from time to time the minimum standards hereinafter described for applicants for and appointees as law enforcement officers;

(c) To consider, hold public hearings on, adopt and promulgate such standards relating to the physical, mental and moral fitness of any applicant for or appointee as a law enforcement officer as do not lower the minimum standards hereinafter in Section 7 provided or as otherwise permitted by Section 7 of this Act;

(d) To study, consider, and to make reports from time to time concerning the work and curriculum of, and the courses offered by, law enforcement training schools in the State and shall make recommendations for improving such schools, curricula, and courses;

(e) To encourage the establishment of law enforcement training schools and courses on law enforcement in existing institutions of learning;

(f) To gather statistics and data and make reports concerning the activities of the law enforcement agencies in the State and their accomplishments;

(g) To consider, study and make recommendations concerning methods of improving the organization and operation of law enforcement agencies in the State and cooperative

arrangements and agreements which might be effected between such agencies;

(h) To make investigation to determine whether the requirements of this Act and the rules, regulations and standards of the Commission issued pursuant to this Act are being observed and followed;

(i) To recommend to the Attorney General, the District Attorneys and other appropriate officials measures for the enforcement of the requirements of this Act and the rules, regulations and standards issued by the Commission pursuant to this Act;

(j) To enter into cooperative agreements with State and local law enforcement agencies for the effective coordination of law enforcement work in the State; and

(k) To obtain the services and advice of experts in the field of law enforcement for the purpose of aiding the Commission in its studies, consideration, reports and recommendations, and the adoption of standards, rules and regulations.

Section 7. Minimum Standards. The minimum standards hereafter in this section provided shall apply to applicants and appointees as law enforcement officers who are not law enforcement officers in the State on the effective date of this Act and to applicants and appointees who, though law enforcement officers on the effective date of this Act, cease to be law enforcement officers before making application for employment as a law enforcement officer or being employed as a law enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on the effective date of this Act a law enforcement officer and who continues until the date of his application as a law enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant, and showing compliance with the following qualifi-

cations:

(a) Age. The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this Act, the time spent by any applicant on active duty in the Armed Forces of the United States of America, not exceeding four years, shall be substracted from the actual age of such applicant who has attained the age of 40 years.

(b) Education. The applicant shall be a graduate of a high school accredited with or approved by the State Department of Education or shall be the holder of a certificate of high school equivalency issued by General Educational Development.

(c) Police Training. Prior to appointment, the applicant shall have completed at least 240 hours of formal police training in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the Commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 90 days after provisional appointment and should he fail to complete such training, his appointment shall be null and void.

(d) Physical Qualifications. The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law enforcement officer. The Commission may for good cause shown permit variances from the physical qualifications prescribed in this subsection (d).

(e) Character. The applicant shall be a person of good

moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law enforcement officer attesting his good reputation.

The foregoing requirements shall not apply to any person who is presently employed as a law enforcement officer in the State and who continues to be so employed when he makes application for or is employed as a law enforcement officer in a different capacity or for a different employer.

Section 8. Penalties. Any person who shall appoint any applicant who, to the knowledge of the appointor, fails to meet the qualifications as a law enforcement officer provided in Section 7 of this Act, or the standards, rules and regulations issued by the Commission under this Act, and any person who signs the warrant or check for the payment of the salary of any person who, to the knowledge of the signer, fails to meet the qualifications as a law enforcement officer provided in Section 7 of this Act, or any standard, rule or regulation issued pursuant to this Act shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not exceeding $1,000.

Section 9. The Fund; Acceptance of Grants and Appropriations. There is hereby established and created in the Treasury of the State the Alabama Peace Officers Standards and Training Fund. The Commission may accept grants from the Federal government, its departments and agencies as well as grants and appropriations by the State, any county or municipality, or any individual, corporation or fund. All grants and appropriations to the State for work within the functions and duties of the Commission and all grants and appropriations to the Commission shall be paid into the Fund.

Section 10. Municipalities and Counties Authorized to

Make Appropriations and Grants to the Fund. The governing body of each incorporated city or town and the governing body of each county of the State is hereby authorized to appropriate any funds not otherwise appropriated to or for the benefit of the Commission and its work. All such appropriations shall be paid into the Fund.

Section 11. Law Enforcement Agencies Authorized to Make Agreements. Each Law Enforcement Agency in the State is hereby authorized to make agreements and arrangements for cooperation and mutual assistance in law enforcement work, with the Commission and with each other.

Section 12. Appropriation. There is hereby appropriated from any moneys in the Fund for the fiscal year October 1, 1971 - September 30, 1972, the sum of $..... and for the fiscal year October 1, 1972 - September 30, 1973 the sum of $....., to pay the expenses of the Commission in the performance of its functions and duties as well as the salaries and expenses of its personnel, office rent, stationery and supplies and the cost of acquiring by purchase or lease the necessary equipment.

Section 13. Severability Provisions. The provisions of this Act are severable. If any clause, provision or section is declared invalid or unenforceable, such declaration shall not affect the remaining portions of this act.

Section 14. Effective Date. This Act shall become effective immediately upon its passage and approval by the governor or upon its otherwise becoming a law.

Approved September 20, 1971.

Time: 2:03 P.M.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 17th day of November, 1971.

JOHN W. PEMBERTON
Clerk of the House

Caption Omitted

AMENDED OFFER OF EVIDENCE

Come now the plaintiffs in the above-styled cause and amend their offer of Evidence of April 1, 1976, by offering the following document:

18. Letter from Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, to Ms. Pamela S. Horowitz, Staff Attorney, Southern Poverty Law Center, dated March 31, 1976.
(Exhibit 24) (Attachment A)

The plaintiffs have already entered into evidence, as Exhibit 8, a document entitled "Administrative Regulation 204 of the Board of Corrections." That administrative regulation incorporates a letter from Mr. Abner Sibal, General Counsel of the Equal Employment Opportunity Commission, dated December 18, 1975, to the Defendant Judson Locke. Both the regulation and the letter were provided by defendants in response to plaintiffs' request for production of documents.

On February 18, 1976, plaintiffs' counsel wrote to Mr. Sibal seeking a clarification of certain points contained in his letter. Mr. Sibal did not respond until March 31, 1976, when he sent plaintiffs' counsel the letter, which is attached hereto, indicating that he wished to correct an important error contained in his December 18, 1975 letter to Defendant Locke.

In Mr. Sibal's letter of March 31, 1976, he corrects his letter of December 18, 1975 to read:

> It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions *and female correctional personnel at all-male correctional institutions.*

This language materially alters the language of his original

letter wherein he referenced only the use of males in all-female correctional institutions.

Plaintiffs were not aware of this error in Mr. Sibal's letter of December 18, 1975, until April 5, 1976, when their counsel received his letter of March 31, 1976. They were thus unable to include it in their offer of evidence of April 1, 1976.

Respectfully submitted,
JOHN L. CARROLL
PAMELA S. HOROWITZ
JOSEPH J. LEVIN, JR.
MORRIS S. DEES
1001 S. Hull Street
Montgomery, AL 36104
ATTORNEYS FOR PLAINTIFFS

* Certificate of Service Omitted.

Exhibit 24

March 31, 1976

Pamela S. Horowitz, Esquire
The Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36101

Dear Ms. Horowitz:

This is in reply to your letter dated February 18, 1976, in which you offer several observations regarding a December 18, 1975, letter sent by this office to Mr. J. C. Locke, Jr., Commissioner of the Board of Corrections of the State of Alabama. Please be advised that through an oversight a segment was inadvertently omitted from the following sentence:

> It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions.

This sentence was intended to have read:

> It is suggested that the State of Alabama, whenever possible, continue to employ male correctional personnel at all-female correctional institutions and female correctional personnel at all-male correctional institutions.

It is also noted that the case of *City of Philadelphia v. Pennsylvnaia Human Rights Commission* should be cited at 5 EPD §8535 not §8538.

We thank you for bringing this matter to our attention. A copy of this letter has been sent to Mr. Locke, so that he may make the appropriate correction to the December 18, 1975, letter.

Sincerely,
Abner W. Sibal
General Counsel

cc: Mr. J. C. Locke, Jr.

ATTACHMENT A

TONY SEWELL

The witness, after having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. NEWMAN:

Q Will you state your name, please?
A Tony Sewell.
Q And your occupation?
A Director of the Mobile Work Release Center.
Q Is that a part of the Alabama Prison System?
A It is.
Q Will you briefly give us a resume of your job history?
A Yes, sir. I have a B.S. in Criminology from Florida State University, and also a Master's Degree in Rehabilitation Counseling from Florida State University. I worked as a Vocational Rehabilitation Counselor and assigned a Pub-

lic Defender case load in the State of Florida in the West Palm Beach District for approximately two and a half years, and then worked approximately a year as a Program Developer for the State of Florida, with the priorities being toward the Board of Corrections.

Q That is the Florida Board of Corrections?

A That is the Division of Corrections there.

Q What primarily did this job entail?

A Working within the major institutions with offenders toward vocational training, vocational placement.

Q When did you take on the present job which you now hold?

A February 12, '75.

Q And that was a Director of the Mobile Work Release Center?

A Right.

Q What type of facility is the Mobile Work Release Center?

A It is one of nine Work Release Centers within the State. It is an all male Work Release Center.

Q Okay. Would you explain what is meant by a Work Release Center?

A Okay. It is men within eighteen months of the expiration of their sentence or parole who are given an opportunity to go to a Work Release Center where we place them in jobs, or some of them have jobs of their own. They work during the business hours of their particular employer and stay with us the remainder of the time. Twenty-five percent of their salary goes for room and board.

Q Is this type institution, is it designated a security designation?

A All the men there are minimum custody, supposedly the cream of the crop of the Alabama Board of Corrections.

Q Therefore is that a minimum security institution?

A Yes.

Q Will you describe the physical layout of your facility down there?

A We are located at 1211 Dauphin Street, which is right in the middle of the Old Mobile Area, I would guess. It is a two-story building with two wings, a lobby connecting the two wings. Most of my men occupy the West Wing.

Q Okay. And by wing, is that sort of a dormitory?

A Right. It is built very much like — it used to be an old apartment building. That is what it was before, an efficiency apartment building. There are approximately seven to eight rooms we use for dormitory-type facilities and four rooms for administrative offices.

Q Okay. And how many inmates do you have assigned to the Mobile Work Release Center?

A At the present time we have forty-six.

Q And how large a number occupy one of these dormitories?

A It is in rooms. As many as seven would be in one room. Usually it would run around six.

Q And how large is one of these rooms?

A Twenty by forty. It is a very large old Southern home.

Q Okay. And the entrance to each of these rooms, does it have a locked door or gate on it?

A It is like a regular apartment building with a door that can be locked within. Then within the room there is a bathroom with a bathtub and a commode and a lavatory.

Q Are these bathing facilities open to the room or is there a door?

A There is a door going into the bathroom.

Q Does this door have an opening in it where you can see?

A It has frosted glass over the door so you can't see

into the bathroom from the outside.

Q So the frosted glass in your experience, does not allow you free view into the room?

A No, you cannot see through it at all.

Q Okay. Now, you say that seven men usually occupy one of these rooms?

A Yes, sir.

Q And there are around six of these rooms that are used as dormitories?

A Well, we have seven rooms that we use for living quarters.

Q Okay. And all of your men are assigned to one of these living quarters?

A Right.

Q How many Correctional Officers or, excuse me, Correctional Counselors do you have assigned to your Center?

A Seven.

Q Seven. What are their duties?

A They are divided up into three shifts. All the men are divided between five of the seven Correctional Counselors. Their duties involve, depending upon a particular shift, it is different between the three shifts, head count for security reasons, counseling, social and personal counseling, job placement, group and individual counseling. During times of escape or something of this nature, we all just about are on call twenty-four hours a day, is what it amounts to. The facility we spoke of before has no bars or locked doors of any sort. The men are free to come and go if they want to at any time that they want to. We have our rules and regulations against movement without letting us know where they are. But the duties would involve keeping a shift log to indicate where the people are at all times, a sign-out roster kept up-to-date. On occasions — quite frequently as a matter of fact, we do have shakedowns which would also involve

a frisk to the point of naked frisk, also in the case of drug users loking for needle marks and needle tracks.

Q Okay. Are there any times during the day when the inmate is restricted to the building that he cannot come and go as he pleases?

A Yes.

Q What time is that?

A After 9:00.

Q Until what time?

A Until the next morning when he goes to work. Now, you understand that some people work second shifts and third shifts, so they are at work after 9:00. But as a general rule, the men who are present are to be within the physical facility there after 9:00.

Q Okay. Now, these seven Correctional Officers, are any of them Correctional Officers or are they designated as Correctional Counselors?

A They are designated as Correctional Counselors.

Q Among these seven are there any women, any female Counselors?

A I have two females.

Q Do they perform the same duties as the male Counselors?

A They have to, yes.

Q They have to. And that includes patrolling of dormitories?

A Right.

Q And all the other duties that the males have to perform?

A Right, including the head count now. With the head count it is required that visual contact be made with an individual to determine that he is present. We have had cases in the past where pillows and blankets were piled up into a pile to form the shape of a body and the man actually

not be there.

Q How long have these women been employed as Correctional Counselors?

A I have been there since February of '75, and they were there then. One lady has been there two years and another one about a year and a half.

Q Have you observed the performance of these women?

A Yes.

Q For the one year that you have been there, have you observed their performance?

A Yes, sir.

Q Have you reached any conclusions concerning their performance as compared to the male Correctional Officers?

A Yes, sir. It is my opinion that the ladies are not able to perform all of the duties as I previously outlined before as capable as the male Counselors that I have.

Q And what do you base these conclusions or this opinion on?

A The frequency that I have to go back to the Center, say, after I leave the Center around 6:00 in the evening to take care of disturbances or minor problems that may arise while the females are on duty.

Q Are the females ever assigned to a Work Release Center by themselves where they are the only Correctional Counselor there?

A Yes, sir.

Q And does that create a problem?

A Yes, sir. As I mentioned before the number of times I have to come back to the Center or my Assistant Director has to come back to the Center, problems that arise through that.

Q Have you encountered any specific problems that leads you to this opinion?

A Yes, sir. Confidential information is what is termed

when the inmates report something to the Counselor or Director, in my case. Numerous times I have had reports on the female Counselors allowing certain male inmates to leave the Center without permission or to engage in some type of social fraternization with the male inmates that I have called them into my office and discussed with them as being unappropriate, in my opinion, as far as professionalism goes, and as far as the adequate conduct for a Correctional Counselor in a Work Release Center.

Q All right. I believe you testified that at night at times the only Correctional Counselor on duty is a female. What specific problems if any does that cause?

A It throws an element of doubt in the accuracy of the count, in the accuracy of the people actually being present in the Center. For example, if a man is coming in from work at 7:00 and the head count is being taken at 7:00 and he is taking a shower, when she goes to make the head count the man is in the shower. Now, if she goes into the shower and has visual contact with this man, it is invading his privacy. A lot of rumors that are reported to me are from such incidents, when a man is either taking a shower or sitting on the commode or something of this nature. The actual count has to be made through voice then. She has to be able to recognize the man's voice and be able to determine if he is there or not.

Q Has this caused any problems with maintaining a proper count?

A Two escapes that I can remember at this point happened at the shift change. The first head count that was taken after the shift changed, the man was discovered to be absent. And in one particular case he was reported as present at 11:30. When he was apprehended, it was found that he had left the Center at 10:00.

Q Was there a female Correctional Counselor on duty

at the time he was reported to be present?

A Yes, it was.

Q Are there any other occasions that come to mind?

A Not at the moment, no.

Q Okay. Have you had this problem with your male Correctional Officers that have been assigned there by themselves at night?

A No, sir.

Q How important is it to take an accurate head count?

A Extremely important in the Work Release Centers. The only means we have of responsibility to the community that we are in, we have to be responsible for the men at all times. If anyone asks where Joe Blow is at 9:00, we are supposed to be able to tell them where Joe Blow is. If he is working, he is present, or he is at a doctor's appointment or wherever he is. A recent example in Mobile is a man that was accused of being involved in a robbery in which a Policeman was shot. The man was reported present at 7:15 and at 8:55 at a head count. The robbery took place at 8:00. Three eyewitnesses said he was there.

Q Let me ask you this. In your opinion why is it difficult for a woman to make an accurate head count at those times that you mentioned? What has caused the inaccuracies in the head count, if you know?

A It would just be my opinion. I have not been present at the time the head count was made, but it would be my opinion that the man was in a bathroom, said he was in the bathroom. Someone could be standing in the bathroom for him, and through the shower and said I am taking a shower and she counted him as being present. Instead of making visual contact with the man in the shower, she assumed he was present and went ahead with her head count.

Q I take it then that the women Correctional Counselors do not enter the shower and bathroom facilities?

A I hope they do not. It would be an invasion of privacy, in my opinion.

Q Well, how would the inmates feel about it?

A I don't think they would appreciate it. Of course, some would not mind at all, since a lady observing a man may be considered erotic of some sort.

Q Have you had any occasion or do you know of any occasion where there have been any sexual assaults on any female Correctional Counselors?

A No, sir.

Q Do you have any explanation for this or in your opinion why this would be, or the reason . . . ?

A Well, in a Work Release Center, we do have the furlough program, the pass program. These are outlets there for the men once a week sexually if they have a wife or girl friend when he is on pass.

Q Would the fact that he is at a Work Release Center or at a very elite type of facility have any bearing on that, in your opinion?

A Yes. They work real hard to get there. A Work Release is almost where any inmate that you talk to in prison wants to be. He wants to be a Work Release participant. Any act of this sor[illegible] he would be immediately, of course, removed from the Center.

Q Generally overall, do you find that there are many assaults of any kind on any Counselor at the Work Release Centers?

A None to my recollection.

Q Okay. If there was an assault on a Correctional Counselor at the Work Release Center, what would be the action that you would consider appropriate to be taken

against this person?

A Press charges with the local District Attorney.

Q Would he be removed from the Release Center?

A Definitely.

Q Have you any knowledge or do you know of any other circumstances in which the fact that the mere presence of the female Correctional Officers have caused sexual connotations, or there have been sexual connotations involved because of their presence, any actions or problems because of that?

A Okay. When I first went to the Mobile Work Release Center on February 26, I think it was, of '75, I had reported to me before I got there that one particular female Counselor was discussing sexual problems with the male inmates to the point of what turns the ladies on, the length or the diameter of a man's penis being important in sexual intercourse with a female, questions of this sort, the very second day I was at the Work Release Center. I arrived around noon the first day. The next day I spoke with the lady about it and explained to her that in my opinion, if it was true, that it was something beyond her expertise, that it should be taken up by a psychologist or a psychiatrist, that it was not within our bailiwick to deal with such problems of this nature.

Q How would something of that type of nature affect the institution or the security of the institution if indeed it would?

A The same problems that we have in any major institution where a lot of men are present. The rumors that come from such confidential counseling sessions, which there is hardly no such thing in the prison system. The word gets out on everything. Since this particular time in the last year, I have had numerous reports by inmates

concerning the socialization of a female Counselor with some of the male inmates. These reports are from inmates to me, that they see the female Counselor while they are on pass. One particular case was that one of the male inmates was supposed to have been fondling the boobs of the female Counselor while she was on duty. Things like this are not only reported to me, but I am sure it is throughout the Center. Other Counselors have brought things to me that the inmates have told them of a similar nature. This creates a disturbance in the orderly running of the Work Release Center. And the staff because of its small number has to be close knit. And when there is any doubt or suspicion of this nature, there is no way that we can work that closely together. I have difficulty with it, because I have to bring these things out to the Counselors and question them about it repeatedly to see if there is any validity to it, at which time of course, they all deny it. But at this time the damage has been done, the loss of respect for the authority of the staff, if it is taking place or even if it is not taking place, I am allowing it to take place. It creates a disturbance in the orderly running of the Center.

Q Well, what is wrong with female Correctional Counselors being seen by an inmate, I take it on their off time while the Officer is off duty?

A Nothing if she wants to do it with the other forty-six also. It develops a jealousness amongst the inmates in that she cares more about this person. Or even with the male Counselor for that matter, he cares more about this man than he does me. It is something that has to be dealt with on a professional level, and I think that is inappropriate.

Q Are there any other specific instances that you can recall of female fraternization or the fraternization between the inmates and the female Correctional Counselors?

A Last week I had an administrative hearing with one of the female Counselors concerning an incident that happened in the lobby between the two wings that I mentioned earlier. My Assistant Director, Mr. Jim Sexton, was at the Center at approximately 9:30. I think it was March 14th. Four inmates were standing around the Correctional Counselor's desk in the lobby. One was seen singing and dancing in front of the Counselor's desk and the other three watching. As Mr. Sexton came in and left the back door open — the lady had been out three days sick prior to this — it was her first day back to work. The inmate reportedly said, who left the back door open, his baby had been sick. He couldn't have his baby sick, that he would close the door. I questioned her about this and she did not deny it, other than me asking if she was present at the desk at the time. Mr. Sexton reported that she was. She said other inmates had called her baby and honey at different times and she simply ignored it and went on about her business or she either took them to the side and told them not to call her baby or honey because the other inmates felt like they could call her baby and honey then. I explained to her at that point that that was the worst possible thing she could do, by pulling them to the side, because if there were any rumors going on for him calling her baby in the first place, when she took him to the side and talked to him in privacy, it only reinforced the rumors that were going around at this time.

Q Well, is this a problem — I mean, could other inmates become jealous of situations like this?

A I would think so, yes.

Q And if this were to occur, how would that affect the security or the running of that institution?

A It already has affected it. As I mentioned before,

the doubt that is involved there merely by the fact that I had to call her in and have an administrative hearing on such a thing as this. You know, it is uncalled for. It is unprofessionalism. With a male Counselor, I don't have that problem, because they are not going to call him honey or baby or any other pet names of this sort. It is just something that there is no place for it within the professional run Work Release Center.

Q Well, has jealousy ever arisen between inmates over a male Counselor?

A No.

Q That is to your knowledge?

A Not to my knowledge. I can give one more example of that now that just occurred to me. I received a letter from an escapee that was incarcerated in Mt. Meigs indicating that one of the ladies owed him some money. She had borrowed some money from him or something of this nature. But the reason she wouldn't pay him or the reason that he was writing was because he knew that her boy friend was probably jealous of him, and that is why she wanted to break off everything and not pay him the money that she supposedly owed him. I questioned the lady about this and she denied owing the man any money or having anything to do with the entire letter that was written by the man that had escaped.

Q Well, in your opinion, do you feel that the mere fact that you have female Correctional Counselors present at this institution would raise the possibility of romantic involvement occurring between Officers and inmates?

A That would be a very hard question to answer. But on strictly my opinion, a man that has been locked up for a period of time, two or three years, before he comes to a Work Release Center, and to be assigned to a female Work

Release Counselor being the first female that he has come into contact with on a regular basis, he had visitors probably when he was in a major institution, but he sees her daily, the chances are more likely for romantic involvement or crushes or similar puppy love-type situations. I would think they would be greater with a female Work Release Counselor than a male Counselor.

Q What would be the danger of puppy love or a crush occurring, if any? How would that affect the institution, if at all?

A Well, it would affect the remainder of my staff in that rumors would be coming in wondering if she was having anything to do with this particular inmate. It is taboo. It is very unprofessional for the Counselor to be carrying on. There would be a separation within the staff there. As far as the inmates are concerned, the elements that you spoke of, jealousy, could be involved if she spends more time with this man than she does with me, and I am assigned to her also. She is doing more for him than she is doing for me.

Q Would these problems that you speak of occur among the male guards, I mean the jealousy of the inmates, the doubts about the guards because of probable romantic involvements? If the females were not there, would these problems still be important? I mean, would they still affect the institution the same way?

A I wouldn't think so. My opinion is there wouldn't be any jealousy involved there. If a man was spending more time with this inmate than he was with another inmate, I can talk to him and tell him what he is doing wrong and there wouldn't be any element of doubt as far as whether there was any romantic involvement.

Q Do you know of any instances in the Alabama Prison System — do you personally know of any instances where romantic involvement between a female staff and a male

inmate has ever come to light?

A Yes, sir. I received a transfer from Birmingham. The man was on the inmate staff up there as a cook. He was transferred to my Center on Work Release since he was from Mobile. Shortly after he was there, I received a call from Mr. Cook, and there was a quite large phone bill that had been accumulated since the man had been at my Center calling, I think, the lady who was a bookkeeper for him in Birmingham. She was relieved of her duties, I understand. But the involvement was quite heavy.

Q Well, how could this affect the institution, romantic involvement between an inmate and the bookkeeper at the Work Release Center?

A Information that would be considered to be confidential information that the bookkeeper would have knowledge of, not only concerning the particular inmate that she was involved with, but other people within the Center would be greatly jeopardized, the confidentiality of that information.

Q At the Mobile Work Release Center is there a necessity for strip searches or is there a necessity for strip searches?

A On occasion, yes, sir.

Q What about the necessity for frisks, thorough frisks?

A Yes, sir.

Q How often does this necessity present itself?

A The naked frisk would be involved when an inmate is suspicioned of using drugs or using hypodermic needle-type drugs. They don't always shoot in their arms. I have never had one at my Center, but it has been reported that inmates also shoot in the legs and arms, the groin area and even as far as shooting into the penis with the hypodermic needle also. When I have a case where I think a man is using drugs, I will check it myself with the presence of another male Counselor. I will have him strip down, have him checked

from one end of his body to the other for any signs of any needle marks.

Q What about the regular frisks while the inmate is clothed?

A That is done by the male Counselors.

Q How often does this necessity arise?

A Whenever I run a disciplinary on a man, when I am going to remove him from the program and put him into a County Jail. I am not going to ride in the car with him until he has been completely searched and frisked.

Q Is it necessary to frisk the inmates when they come into the Center?

A We do not frisk them when they come into the Center.

Q I take it that females are not allowed to participate in this frisking activity?

A No, sir.

Q Are drugs a problem at the Mobile Work Release Center?

A I think they are a problem in every institution within the Board of Corrections. But yes, sir, I have drugs in my Center. We run urinalysis to check for them. We are constantly on the surveillance for any drug traffic that may be coming into the Center. But drugs are in the Center, I am sure.

Q Okay. If drugs were brought into the Center, in what area of the Center would they most likely be used?

A One male Counselor caught some in the bathroom. If it is used inside the building, it is in the bathroom.

Q Okay. Now, what effect would it have if women were not allowed to patrol the bathroom facilities if they were the only Officer on duty?

A The man can say I am sitting on the toilet.

Q And can carry on his activities there?

A Right. He would have plenty of time to dispose of

anything he may have been doing before she could go in, if he reported that he was sitting on the toilet or taking a shower.

Q Then it would be in your situation essential that a female have free run of the entire facility?

A Yes, sir.

Q Including the bathrooms?

A Right.

Q Well, is it possible that if she has free run of the facility, I mean by being allowed to go into the bathrooms, that she would knock first?

A I think that would be called for, yes, sir.

Q Well, would it not defeat the purpose of a surprise search?

A Absolutely.

Q In what way?

A The man would have time to get rid of anything he may have been holding. The male Counselors would just go on in.

Q Based upon your knowledge of the Mobile Work Release Center, do inmates as a whole respect, and I mean follow instructions, and feel that they can't get away with the same type of activities — well, just generally feel the same authority as when . . .

MR. CARROLL: I object to him testifying as to what the inmate feels.

Q All right. Based upon your experience at the Mobile Work Release Center and based upon your knowledge of the inmates there, do you have an opinion as to whether or not the inmates respect the female Correctional Officers to the same degree as they do the male Correctional Officers?

A In my opinion the male Counselors carry more respect for the authority of the position that they are in than the female Counselors carry.

Q All right. How is that manifested to you, or what do you base that on?

A Okay. My opinion is based on the confidential information that is passed on to me by the inmates at the Work Release Center. Such things as the female Counselors allow certain inmates to do things that they are not allowed to do. These people who report things to me are usually speaking for the purpose of protecting the Work Release Center. They feel like it is a good thing and they don't want to see it messed up, like one man being gone, for example, and counted present when they know for certain he is gone. They have expressed their feelings that they felt that the Counselor on duty at the time knew that they were gone.

Q Have you ever had occasion to know of this personally, where an inmate has been gone when he should not have been gone?

A Yes, sir.

Q I am not talking about escaped now?

A Yes, sir.

Q What was that?

A I forget the time and the date, but a female Counselor was on duty. I came in about 9:30 or 10:00 at night for a supportive head count, I call it. I instructed my Assistant Director and also one other male Counselor, a lot older than the rest of the Counselors, Mr. Tom Elezor, to go by the Center at night. We took turns going by the Center at night, because we had reports of so many people being absent from the Center and being counted as present for the supportive head count. That particular time I came in and she reported that two men were absent. I said where are they. She said they were supposed to be back at such and such a time and they are not back yet. I looked at the log and it was not reported in the log that they had gone anywhere or that they were sent any place. The last room check

was made at approximately 8:00, at which time they were counted as present. I asked the lady point-blank if she would have reported this had I not come in. She said no she would not have reported it. I asked her why. She replied because it was the first time she had had any trouble with these two particular inmates at any time.

Q Has this problem arisen while there have been males on duty?

A No, sir, not to my knowledge.

Q That is the problem of not reporting absent inmates?

A Right. One other thing I could add. We were talking about authority. The female Counselor told one of the inmates to do a particular task. I think it was to help clean up the dining room. He turned and said no, I will not do it, and walked upstairs. Now, this man was brought in my office immediately the next day and he denied it. But the two people that she told to do it after that told me directly that this man had flatly refused to do it and had walked upstairs, and she had told them to do it in his place.

Q She did not report this to you?

A It was not reported.

Q How important is it to report incidents like this that you have just told me about?

A In my opinion very important. Because if one gets by with it, does not show the proper respect for authority for the person who is in that particular responsible position, it can destroy the entire program, because others are going to try it also. If something of this nature is going on, I want to know about it immediately.

Q Well, how important is the respect of the Correctional Officer — the inmates' respect of the Correctional Officers in running any institution?

A As important as it is for them to respect the Policemen when they are on the street. It is authority that has

to be respected. You and I have to respect it.

Q Once that respect is no longer there, does it create problems?

A Yes, sir.

Q I believe you have testified that in your opinion you have found that there is less respect for the female Correctional Officers as a whole?

A Yes, sir.

Q You have talked about confidential information. How important is confidential information in a prison system?

A Well, once again this is going to be my opinion now. But in my opinion, it is essential.

Q Why is that?

A Because I cannot be there twenty-four hours a day. Now, the validity that I put into the confidential reports is based upon the reliability of that particular source in the past.

Q And these reports that you have received, is it based in your opinion on reliable sources — well, sources that have shown themselves to be reliable in the past?

A Yes, sir.

Q How important is it for the Director or Warden or whoever is the top man of a penal institution to be on top of what is going on in his institution? How important is it for him to know what goes on in his institution?

A If he is going to do his job efficiently, he has to know.

Q If you know, tell me whether or not confidential information or information based upon confidential sources is a common practice in penal institutions?

A I cannot speak for the other Wardens, I can only give my opinion and say that I think it is. It is something that is protected.

Q In your opinion, based upon your experience at the Mobile Work Release Center, should women be hired on the

same basis as men in a correctional institution, that is should they be put in contact-type positions, contact positions being where they exert control?

A In my opinion if they can establish their ability to have control, yes. If they cannot have the control that a male Officer or Counselor in the same position could have, I do not think they should be there.

Q Have you found from your experience that the women at the Mobile Work Release Center have failed to establish this control?

A I have reason to question the control that they exert.

Q Do you feel that the facility would run more efficiently if the female Correctional Counselors were not assigned there?

A I do.

MR. NEWMAN: That is all.

CROSS EXAMINATION

BY MR. CARROLL:

Q Mr. Sewell, I believe that you stated that for a period of time you worked in Florida in the Florida State Prison System; is that correct?

A With the Division of Vocational Rehabilitation assigned to a public defenders case load which took me into the prison.

Q Can you describe those duties a little bit for me?

A Okay. I worked the Belle Glade Correctional Institution there in Belle Glade, Florida, where I went to the institution through the Warden and the Assistant Warden and interviewed inmates for work release for vocational rehabilitation clients.

Q Were there any female Correctional Officers employed in the Belle Glade facility?

A Not to my knowledge.

Q When you finished with the Florida counselor service, what was the next position you held?

A With the State of Florida as a special project out of the Governor's Office, Community Services Delivery System was the name of it. We were trying to deliver an umbrella system for all the related rehabilitative fields. I worked as a program developer in that in trying to coordinate the efforts of the sister agencies with the Division of Corrections in Florida for better services to the inmates.

Q Did that actually involve going into the institutions?

A Yes, sir, more so than the V.R. position did.

Q What did you do when you went into the institutions in this particular job?

A I worked with the Warden once again in setting up programs within institutions such as prerelease where the unemployment office would be brought out for jobs and explanation of jobs and how to apply for a job. Just coordinating the efforts of other agencies in helping the Division of Corrections with the problems they were having.

Q When you finished with that particular job, what was your next employment?

A I worked with a construction firm in South Florida for about a year.

Q Was that in a correctional related field?

A No. This was completely unrelated at all. I went for the money and worked as a Field Superintendent for a construction company for about a year and as a Field Superintendent for a landscaping company for about nine months.

Q What year was this?

A Well, I have been with the Alabama System for a year. I terminated employment in December of '74 with the landscaping company. So nine months back would still be '74. So '73-74.

Q And in '74, you then came to be Director of the Mobile Work Release Center?

A Yes, sir. I came back to my home state of Alabama. My family lives in Bullock County, Alabama. And then six weeks later I went to work for the Board of Corrections in Alabama.

Q I believe you testified that there are seven Correctional Counselors that presently work at the Mobile Work Release Center?

A Yes, sir. I have a staff of eleven now, one secretary-bookkeeper, one Steward, Assistant Director and seven Counselors.

Q I also believe you testified there presently are two female Correctional Counselors at the Mobile Work Release Center?

A Yes, sir.

Q Have these women been employed the entire time that you have been the Director of the Mobile Work Release Center?

A Yes, sir.

Q How about the five males?

A Right now I should mention, I guess, that I am one Counselor short. One Counselor transferred to the Atmore Work Release Center. I have hired one Counselor since I have been there. He is presently in school in Bay Minette.

Q The two female Correctional Counselors, how did they enter the correctional system? What jobs had they held before the correctional system; do you recall?

A As I recall, neither of the two had experience in correctional work before they were hired.

Q And what are their names?

A Edith Briers and Barbara Ruffin. Now, both of these ladies are going to school in Criminal Justice, and this past quarter earned their Master's Degree from Troy State University in Criminal Justice.

Q The male Correctional Counselors, what are their

names?

A Don Evans, Mike Sullivan, which is the newest Counselor that I have and the one that I hired, John McGill, Mr. Elezor, Thomas Elezor, Jr.

Q Okay. That is four.

A I am one Counselor short.

Q So presently you have six on the staff?

A Right.

Q Okay. What was Mr. Evans' background? Did he come out of another institution?

A No, sir. He was not correctional related. He had worked as some kind of a guard, I think, or with a security guard system.

Q How would you rate him as an employee?

A Average.

Q How about Mr. Mike Sullivan, what was his background?

A He was in the service. He was in the Military Police, and he is in school in Criminal Justice and that is where I found him, in South Alabama.

Q And how would you rate him as an employee?

A Good, very good.

Q Mr. John McGill, what is his background?

A He did not have any correctional background either before he came here. He is a very good employee too.

Q How about Mr. Elezor?

A Mr. Elizor is an ordained Methodist minister there in Mobile. He is forty-seven years old, I think, and he is extremely good.

Q I assume from your testimony that you would rate the two female Counselors as poor to below average? You wouldn't rate them very high, I would assume?

A One, Miss Briers, I would rate as just below Mr. Evans there. She is a good employee. Miss Ruffin would

be in the poor range.

Q Now, I believe you made a statement in your direct testimony that women — pardon me, you used the term ladies are not able to perform as capable as men in this particular field of correctional counseling. Would you state for me again the basis for that particular opinion?

A The element of doubt involved in the accountability of the inmates when head counts are taken, their ability to handle the Center in the absence of the administrative staff in the professional manner that I in my opinion think it should be handled.

Q And this is based on your experience with the two females that are presently under your supervision; is that correct?

A Yes.

Q Now, you just rated one of those as a good employee?

A Yes.

Q So I can interpolate that the other one is the problem?

A Yes, sir.

Q So it really is one female employee that you are using as the basis for your opinion?

A I only have two. One is better than the other one, yes.

Q Okay. Have you yourself undertaken any sort of either program or set of orders or personal contact with your female Counselors in integrating them into the previously all male Correctional Counselor positions?

A Yes, sir, I have.

Q Would you describe that?

A The S.O.P., Standard Operating Procedure, that we drew up to explain what to do in certain cases. I have talked with the ladies extensively on the conduct and professionalism involved in working in an all male Work Release Center. Such things as going on a job interview with a male, taking

a male for a job interview. As long as it is handled in a professional manner, there should be no problems involved at all. In a case which happened not too long ago where the female took one of the male inmates with her to her house — she left some papers she had to have for work at her house. She asked the male to take her over there in his company truck that he happened to have and they were gone about fifteen or twenty minutes and were back. This took place at 9:30. With a male Counselor this would be no problem there. With the female Counselor there is quite a bit of problems there as the rumors that came to me in the next two or three days as to what took place there.

Q So apparently these rumors are an important part of forming your opinion that female Correctional Counselors can't do the job as well as men?

A Any disturbance that takes place in the Work Release Center is a problem.

Q Are rumors normal among an inmate population?

A I would assume, yes, sir.

Q Do you get concerned about all the rumors that the inmates float by your office?

A Any information that comes to me that is contrary to the way I think that the Center should be operating is of concern to me.

Q Okay. Let's talk about some of these other rumors. What kind of other rumors concern you other than the sexual misconduct between the inmates and the female Correctional Counselor? What are some of the other concerns that you have that these confidential informants bring to your attention?

A The absentee of a man being absent from the Center when he was reported to be present.

Q Any more?

A That in relation to what I mentioned earlier also.

Q What sort of guidelines have you set down as far as

fraternization by Correctional Counselors in the Work Release Center?

A I have tried to explain the difference between rapport and friendship, and the importance of handling rapport at the Center during business hours and not letting the rapport turn into friendship after business hours in the form of taking inmates to their home for dinner or something of this nature. I think that is very inappropriate and can lead to nothing but problems.

Q Have you had any Correctional Counselors take inmates home to dinner?

A I have had several requests, but they have all been denied.

Q Okay. Have you had any complaints from the inmates of your so-called confidential informants about male Correctional Counselors?

A No, sir.

Q Now, I am not talking about complaints about fraternization or socialization, I am talking about any complaints?

A Yes. I have had complaints on one Counselor, the one that transferred to Atmore in that he was unfair. He wrote people up too quickly, would not give them the benefit of the doubt. Now, Don Evans that we named earlier that I rated average, he also had problems of this sort, that he was too hard nose in his approach to the inmates and this was more of a personality conflict than it was anything else.

Q Did these particular Correctional Counselors report to you all conversations they had with inmates any time an inmate talked back to them?

A Yes, sir.

Q They did?

A In a memo form usually; if not, they check with me when I get there in the morning.

Q How many times did that occur?

A I can't give you a number, but numerous times.

Q How many escapes have there been at the Mobile Work Release Center?

A Thirteen.

Q How many of those occurred when female Correctional Counselors were on duty?

A I could not tell you exactly.

Q I thought in your direct testimony you mentioned two?

A The two were involved when they were on duty. I was speaking of the turn of the shift involved there.

Q Okay. Earlier you testified to some singing and dancing. Well, let's go back to the two female Correctional Counselors. Tell me everything that has happened in the year that you have been there that Miss Edith Briers has done that leads you to believe that she is less than a good employee. Well, you said she was a good employee. What are the things that you have found objectionable to her as a Correctional Counselor?

A Okay. Recently I learned that she was filling out Income Tax Returns for the inmates and charging them Six Dollars apiece, or accepting money for the services that she was rendering. Now, any time that money is exchanged between the inmates to the Counselor, I get numerous rumors, one of which she was charging the inmates to allow them to be gone from the Center. I just get numerous things of this sort that come from that.

Q Okay. What were the sources that brought this to your attention?

A Two inmates and one Counselor.

Q And which Counselor was it?

A It was John McGill.

Q Okay. Now, what did you do? Did you confront Miss

Briers with this particular incident?

A I held an administrative hearing on the matter.

Q And what was the result of the administrative hearing on the matter?

A It was my opinion that she was not actually fully aware of the regulation involved in trading and bartering with the inmates. She voluntarily returned the money that had been given to her, and I in turn advised my Supervisor suggesting that the matter be dropped at this point.

Q Okay. Continue with the problems with Miss Briers if you would.

A During this same administrative hearing, I brought up the metal Social Security plates that she was also selling to the inmates. I instructed her not to do that any more either.

Q Okay. When was this, in March you say or February?

A This was last week, this particular administrative hearing took place. As far as rumors go, I have had rumors about her also that she was allowing the selective inmates to be absent from the Center when she was on duty.

Q Is there any evidence of that?

A None that I can put my finger on.

Q Okay. Continue with her problems if you would.

A That was the lady I was referring to when I spoke of the escapee that wrote the letter back to me saying that the lady owed him money, and that the reason he escaped — or, she wouldn't pay him was because her boy friend was jealous of him.

Q Did you pursue that matter any further?

A I confronted her with the letter and asked her about it and she denied it, all knowledge of it.

Q Okay. Continue if you would.

A With Miss Briers?

Q Yes.

A That is it.

Q Okay. How about Miss Ruffin, how about telling me since you have been in Mobile Work Release the things that you have found objectionable about Miss Ruffin.

A Sometime before our round last Summer my wife and I were at the Bel Air Mall in Mobile and I saw Miss Ruffin walking down the Mall with a male companion. We spoke and kept on going, and later I realized that she was supposed to have been on duty that night. The next morning I asked and she had two Counselors on duty, and she had taken a little time off to go shopping because there was a death in her family and she had to buy something for the funeral. It has been reported in rumor form that Miss Ruffin was engaged in breast fondling at the Center with one of the male Counselors.

Q Did you verify those rumors?

A I discussed it with the Counselor. They were not verified, no, sir.

Q So you do not know for a fact whether that ever occurred at all?

A No, sir, I don't know for a fact that it did occur. I do know for a fact that it occurred to the point that rumors were started and it circulated throughout the Center.

Q So the rumor is really the disastrous part of this particular incident?

A Yes, sir.

Q Continue if you would with Miss Ruffin's conduct.

A Okay. Before the Bel Air incident, I testified to the first confrontation that we had the second day I was at the Center concerning the . . .

Q I am sorry to interrupt you. Now, the rumors that

we are talking about, about Miss Ruffin and the breast fondling, were they inmates or staff?

A Inmates.

Q Okay, thank you. I am sorry I interrupted you.

A Okay. Just going back to the counseling depths that were going on before I got to the Center concerning the discussion of sexual practices and the like. This was confronted with her. She admitted to discussing related subjects, but not exactly the ones that I brought out in the earlier testimony with the inmates. When I explained that this should be done by people with more expertise than we had, she agreed and said she would cease. I have had no reports of this type discussion going on since.

Q Did she admit to discussing this particular matter with the inmates?

A She admitted to discussing sexual matters with the inmates upon their request to discuss problems.

Q And you find that objectionable?

A Yes, sir.

Q In what regard?

A Because I do not feel that it would have been gone into in a professional manner, that it was more in an effort to embarrass — well, the matter in my opinion should not be discussed by my staff since they do not have the training or expertise to go into this particular line of counseling. We have access through sister agencies to psychologists and psychiatrists who are on their payroll or staff or within their ability to obtain where matters of this sort can be discussed.

Q Would you have found it objectionable if a male inmate and a male Correctional Counselor had discussed each other's sexual problems?

A Yes, sir, I would have.

Q So you would have taken the same action had you come upon a conversation where both of the male participants were talking about sex; is that right?

A If they were talking about sex as far as their inability to perform and why and in a sexual experience, yes, sir, I would object.

Q Now, if you would continue with Miss Ruffin's conduct.

A The accuracy of the log on several occasions I have called her attention to things that should be in the log that were not reported in the log, such as visitors that she had at the Center as well as visitors that inmates had when it was not during the normal visiting hours. Also the accuracy of the count as it is reported in the log. We have at this time forty-six people. Week before last we also had forty-six people. But in her report in the log she had two people accounted for being at work, two people accounted for as being at school and forty-four present. Now, the total added up to forty-six in the log, but that adds up to forty-eight.

Professionalism in this manner is what I am talking about. Now, the way that count is taken I also object to. I have been with her when she knocked on the bathroom door and asked who was within, and the report from the inside gave a name. She marked the man as present and went on to the next room.

Q What are your instructions to female Correctional Counselors as far as entering the latrine area to do things like determine who is in there and that type thing?

A It is the policy at my Center for female Counselors not to enter the bathroom, but to stay within the area until the man comes out of the bathroom to make visual contact with every inmate before he is counted as present. Now, in the bedroom or in the dormitory setting if the man is in bed,

some form of life or recognition has to be seen before the man is counted as being present.

Q So by not going into the bathroom she was following your directions, your direct orders; is that correct?

A By not going in the bathroom she was, but by going to the next room she was not.

Q As I recall your direct testimony, the reason you don't let your females go into the bathrooms is that you feel that that is an invasion of the inmate's privacy?

A I do.

Q Do you conduct searches of the inmates?

A Yes, I do.

Q Do you conduct searches of the belongings of the inmate?

A Yes, sir.

Q You don't consider those invasions of their privacy?

A It is in the presence of them.

Q But you don't consider that invasions of the inmate's privacy?

A We are looking for contraband at the particular time. We are looking for any weapons that the man may have before he is removed from the program.

Q So in that particular context, the security of the institution is dictating your policy; is that right?

A Yes, sir.

Q But the security of the institution's doesn't dictate your policy as far as females going in latrines?

A I am not sure I am following your line of questioning here. What I am talking about is a man's privacy while going to the bathroom or taking a shower.

Q But you don't believe that a man has a right to the privacy of his person not to be searched?

A I do believe he has the privacy of his body not to be

searched when there is no probable cause to search that body. If I have probable cause to search the man, I am going to search him.

Q But what I am saying is, when there is a clash between invasion of privacy and effective running of the institution, the effective running of the institution should be the controlling factor; is that right?

A What am I supposed to say, yes? Okay, yes.

Q Okay. Back to Miss Ruffin again, if we can continue with her catalog of her conduct.

A Okay. Discussions when I discuss elements of her conduct with her in the privacy of my office, it has been brought to my attention and I have brought it to her attention that she goes back into the lobby and during the course of the rest of her shift it is discussed with inmates and I find this objectionable.

Q Would you clarify that just a little bit?

A What went on between us, what I discussed with her in the privacy of my office. She takes it back out in the population of the Center and discusses it with the inmates. I consider this to be non-professional and object to it.

Q And you, of course, have told her of your objection?

A I have.

Q Okay. Continue if you would.

A Her dress, the manner in which she wears her clothing. I have asked her not to wear low-cut blouses or tight-fitting blouses or tight-fitting clothes or pants or short dresses. I feel that this is a distraction from her job by being in the presence of forty-six male inmates. It has been my experience to walk up to the Counselor's desk where she is sitting and writing slightly leaning forward and there would be three inmates jockeying for position in front of the desk.

Q Okay.

A She is unmarried but has two children. On occasions she has to be late to work due to taking care of her family. But that is really something that I have discussed with her, but it has also taken place with my male Counselors, so it would be unfair to list that as being the only case.

Q Can you think of anything else?

A Not at the spur of the moment.

Q Okay. Miss Ruffin has been under your supervision since you have been there. Do you know how long she has been employed at the Work Release Center?

A As I recall, when I first arrived I had approximately two weeks before I had to fill out her efficiency rating for permanent status. So she had to be there a year before that, within almost a year. I would say fifty weeks there before I came.

Q You filled out her efficiency rating. I assume that you talked to your predecessor in office about her?

A Yes.

Q What was his particular opinion?

A His opinion was that the lady had a lot of potential, and that she could outgrow the problems that I have mentioned before.

Q Since she has been in your employ, have you recommended her dismissal?

A No, sir. I have recommended she be suspended for five days.

Q Was that suspension carried out?

A It is in the process now. It is to be some time next month.

Q Can you explain to me a little bit more about this transfer to Atmore of a particular male Correctional Officer?

A Yes. He goes to school at Troy Extension in Bay Minette. He has a fiancee — well, not his fiancee, but his

girl friend who lives in Atmore. He desired to work in the Atmore Work Release Center.

Q And you transferred him at his request, it was not a disciplinary matter?

A Right. I transferred him at his request. I hated to lose the man.

Q And it is your testimony that you have had no problems with the five male Correctional Counselors; is that correct? I believe you testified that one of them the inmates considered to be overly . . .

A Strict.

Q . . . overly strict?

A Yes, sir.

Q But outside of that absolutely no other problems?

A Not in the same line that we are talking about with the female Counselors.

Q And, again, your opinion is based on your experience with Miss Ruffin and Miss Briers?

A Yes.

MR. CARROLL: I have no further questions.

[Dep 58-59]

BILL GILMORE

The witness, after having first been duly sworn to speak the truth, the whloe truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. NEWMAN:

Q Would you state your name for the record?

A Bill Gilmore.

Q And your occuption, Mr. Gilmore?

A Director of the Frank Lee Youth Center.

Q Is the Frank Lee Youth Center a part of the Alabama Prison System?

[Dep. p. 4]

A Correct.

Q And what type of facility is the Frank Lee Youth Center?

A It is a minimum security first offender, young offenders.

Q How long have you been Director of the Frank Lee Youth Center?

A Four years.

Q And prior to that what position did you hold, if any?

A I was a Warden at the Medical and Diagnostic Center, which is now Kilby.

Q Is that also a part of the Alabama Prison System?

A Correct.

Q Did you hold any position prior to that with the Alabama Prison System?

A I was Warden at Tutwiler Prison.

Q And for how long were you a Warden?

A One year.

Q And what year was that, if you recall?

A '70 and '71, parts of '70 and '71.

Q Did you hold any other position with the Alabama Prison System?

A Yes. I was, of course, at the present Kilby facility on two occasions totaling somewhat over two years. Of course, prior to 1970 I was Classification Supervisor at Kilby.

Q And how long were you Classification Supervisor?

A Supervisor for four years and Classification Officer for about twelve years.

Q Would it be fair to say that you came with the Board of Corrections around 1955, '54 or '55?

A No, '57. Straight from college.

Q And what is your educational background?

A Bachelor of Arts, Major in Sociology.

Q And right out of college you went to work with the

[Dep. pp. 4-5]

Alabama Board of Corrections?

A Correct.

Q Okay. As a Classification Supervisor, what were mainly your duties?

A Primarily in assignment of new inmates to various institutions and various custodies.

Q In that job did you get familiar with the inmates, I mean as far as their traits and their attitudes?

A I had personal contact with them from short periods of time to long periods of time, with all of them, in the Board of Corrections.

Q As Classification Director, what were your duties?

A Well, I directed the processing of the new inmates, but also I was Chairman of the Central Classification Board in making the initial assignments.

Q Okay. And what were these assignments based on?

A Based upon, of course, primarily custody, and then upon age, then upon skills and of course what programs, whether it be academic, vocational or trade.

Q Now, what were your duties as Warden of Julia Tutwiler? For the record, is that a male or female institution?

A Female.

Q What were your duties as Warden there?

A Well, like any Warden's job, you are responsible for the total operation of the institution, not only in supervising your staff, but the inmates and all aspects of the institutional operation.

Q Were your guards or security people at Tutwiler primarily male or female?

A Primarily female.

Q Did you also have male guards?

A Yes. If I recall exactly, I had three males at the time.

Q And this was in '70-71?

A Let me see. In thinking back, I think we are talking

about parts of '71 and '72. Correct that.

Q Okay. Did these males that were assigned to Tutwiler have any specific duties?

A Primarily they were used in manning the back gate, which is an outside position. And then at other times we would use them in the central hall area. And then on Sundays we would perhaps use them in the lobby in handling our male visitors.

Q Were they placed in contact positions with the female inmates?

A No. They did not go — for instance, they did not go in the dormitory or in your areas where the females were, say, undressed or partially undressed.

Q Were they allowed to conduct strip searches?

A No.

Q How about frisk searches?

A No, they did not.

Q Was there ever any occasion that they were used to subdue unruly inmates?

A Only in rare instances if they happened to be in the area, like on the central hall, then they would assist in, say, escorting the female to solitary confinement, or breaking up a minor fracas.

Q Now, I believe you stated that from there you went to what is now Kilby Correctional Center?

A Correct.

Q And your position there was Warden?

A Right.

Q And what were your duties as Warden at Kilby?

A As I mentioned before, the Warden's duties encompasses the total operation of the institution, including of course the hospital facility and, of course, the staff and the inmates' welfare at the institution.

Q All right. Did any of your duties at Kilby bring you

into contact with the classification of inmates that was going on at Kilby?

A Yes. We were directly at times and indirectly at times involved in the classification of new inmates, and also in the reclassification of inmates.

Q Were you personally involved in any of that?

A Yes. As Warden there I was a member of the Classification Board for part of the time, anyway.

Q Let me ask you while you were at what is now known as Kilby did the Board of Corrections of the Alabama Prison System employ any females at that time as Correctional Counselors or Officers at Kilby?

A No.

Q All right. From there you went to the Frank Lee Youth Center as Director?

A Correct.

Q And that was about 1972?

A I think it was March, '72.

Q All right. What were your duties there?

A As Director, which is synonymous with Warden, that is responsible for the total operation of the Youth Center.

Q Okay. And the Youth Center, I believe you stated, was a minimum custody or minimum security institution?

A Correct.

Q What type of inmate is primarily found as far as custody classification or ages or what crime?

A The nature of the institution is set up whereby only first felony offenders are assigned there, only inmates under the age of twenty-three and not to exceed a ten year sentence. We also screen the violent-type offenders. We rarely assign a person that has an offense of violence. It is mostly burglary and grand larceny.

Q What is the main function of the Frank Lee Youth Center?

[Dep. pp. 9-10]

A It is primarily a rehavilitative-type institution. There is offered to all that attend, all that are assigned there, academics. All of them have the availability of a vocation. That is our primary reason for existing, is giving educational and vocational and academic instruction versus a work camp.

Q It is not a work camp, but primarily a school camp?

A Right.

Q When you first became Director of Frank Lee, what was the total capacity of that unit?

A One hundred.

Q And how many inmates were assigned there?

A When I first was assigned we had seventy-three and shortly thereafter it was increased to one hundred.

Q At the present time, what is the capacity?

A One hundred thirty-seven.

Q Is that the capacity or the number that is assigned there?

A The number that is assigned there.

Q What is the capacity?

A Capacity of two hundred.

Q Now, how is the Frank Lee Youth Center set up?

A It has a telegraphic design, that is it has four wings of dormitories with a recreational area between each dormitory, and then adjoining the two dormitories — adjacent to the four dormitories is a bathroom and shower area.

Q Okay. Let me see if I am correct now. Are there four dormitories connected by a recreational facility?

A Between the two dormitories, correct.

Q Between . . .?

A Each dormitory has an area between them with an Officer's Post and the recreational area.

Q So you have four consecutive dormitories connected with recreational facilities?

A Correct.

[Dep. pp. 10-12]

Q Now would I be correct in saying there are four fifty man dormitories?

A Correct.

Q Okay. And would each dormintory have a bathroom facility?

A Each dormitory has a lavatory and sink — I mean a commode and lavatory.

Q And is this divided from the dormintory by a wall with a door or how is it connected to the dormintory?

A The dormintory has a wire screen and a screen door — I mean a solid door. But the wall is about two feet or thirty inches in height, so it is an open — that is you can stand outside and observe the total dormitory, including your bathroom area.

Q If you are inside the dormitory, can you observe unobstructedly the bathroom facilities if you are standing inside the dormitory?

A Oh, certainly. It is open.

Q Now, how many Correctional Counselors or Correctional Officers or security persons are assigned there?

A Today?

Q Today, yes, at the present time.

A Eleven. Well, let me correct that. Today there are ten assigned there.

Q Do you have any Youth Development Officers there?

A We have six.

Q Were those included in the ten?

A No.

Q Do they also serve in a dual capacity as a Security Officer?

A Correct. They have to be used interchangeably as security.

Q So you have sixteen?

A Correct.

[Dep. pp. 12-13]

Q Of those sixteen, how many, if any, are female?

A Six.

Q And can you tell me when the first females were assigned to the Frank Lee Youth Center, if you know?

A Early in 1974. I am not too sure of the date.

Q All right. And in what capacity were they assigned there? I am talking about as Correctional Counselors or Correctional Officers.

A Correctional Security.

Q In a security position then?

A In a security-type position. Now, I might correct one thing. In Youth Development we had four and one of those was a female. So there has been a female in Youth Development.

Q Let's go back. I think I confused you by my question. In fact, I am pretty sure I did. When the women Correctional Counselor trainees or security-type Officer was assigned to Frank Lee, what capacity or what jobs or duties were they assigned to when they first were assigned there?

A Security.

Q And what did that entail?

A It entailed walking through the dormitories, making counts while there, not only while they are up, but after lights are out and they are in bed. It entailed rounds through the shower room area at all times. It involved some instances of shakedowns, frisking the inmates, plus going through his locker.

Q Okay. Are those duties which you have just described the same as a male Correctional Counselor security personnel is supposed to carry out?

A That is correct.

Q So they are identical duties?

A Yes.

Q Is that still the case now, today?

[Dep. pp. 13-15]

A That is correct.

Q Okay. So would it be fair for me to say that you have women employed at the Frank Lee Youth Center in a contact position?

A That is correct.

Q Okay. Now, I believe you testified that it was two and a half years ago or around two and a half years ago or around 1974 when these females were first employed. Have you observed their performance since that date?

A Yes.

Q Okay. Have you reached in observing the performance of your female Correctional Counselors or security personnel, have you reached any conclusions concerning their performance as a whole?

A Yes, sir.

Q And what would these conclusions be?

A I have found that they are not as totally effective as the male in many aspects. In one sense they do not command the authority that the male gives, that is an inmate will not readily obey her. He will tend to argue and sometimes reach the point of insubordination before she gets him to adhere to her orders. Other aspects which I have noticed is that she is limited in her surveillance of, for example, the shower room area, which is a critical area up there. She hesitantly goes through the shower room, but she will not, like the male you know, stand and observe or stay in that area for a period of time, especially when they are showering or using the commode. So her observance is more tacit than the male Officer's.

Q I take it that there are penalties for insubordination at the Center?

A Correct.

Q Have you ever had to penalize an inmate for insubordination to a female?

[Dep. pp. 15-16]

A Correct. Just two or three weeks ago one was transferred for being insubordinate to one of the female Officers.

Q Have you found that this insubordination occurs more often when it is a woman or female Correctional Officer than a male?

A Well, not the insubordination per se. I am saying in most cases the inmate will not go to the point of being insubordinate, because he knows the penalties for this. But he will try her to a point, that is he will argue, he will not carry out her instructions until finally after aggravating her or getting written up for a lesser offense, he may stop at that point. But she has a difficult time in getting him to go ahead and more voluntarily do what she has asked him to do, whereas with our male Officers they don't try them to this point, because they know that he will take firmer action at an earlier point.

Q Now, based upon your almost twenty years experience with the Alabama Board of Corrections, and more specifically fifteen years in classification, would you say that this problem is because of the Officer's sex, that is that she is a woman, this trait of readily arguing with them, with the Officer, and taking her to a higher point of — higher degree of almost something like insubordination? Would you say that based on your experience that this is solely because she is a woman?

A Certainly. He recognizes probably softness on her part to start with. It is synonymous with your mother-father situation. Often times we will argue and sometimes can get away with more with our mothers. But when your father is involved, you tend to go ahead and fall in line earlier.

Q Do you have any opinion as to the attitude, the general attitude of the typical, what you would call a typical inmate in the Alabama Prison System as to a woman, what his attitude toward her is?

[Dep. pp. 16-18]

A I think most of them have, you know, a certain feeling about the role of a female and where her function is in society. I think this is something that they share with most males. But the inmates at Frank Lee — of course I can't speak for all the inmates in the system at this point — but they have a good deal of respect for the female. They are not necessarily negative to the female being in the institution in certain roles. But the feeling generally is that they don't think she ought to be back in their shower room and back in their dormitory. For instance, not long ago one inmate related to one of the male Officers about does he have to use the commode while the Officer is standing out there.

Q In other words, the inmates greatly object to a woman being present in their living area?

A Yes. This is not something they have been used to. They are a little hesitant about, like I say, showering, using the bathroom or something while she is in their presence.

Q How does this affect your institution?

A Well, of course it limits our observation and security. Like I say, if you have an Officer assigned in an area and if she is not all eyes and really observing and moving around in the critical areas, then you certainly are not getting the security that you need and the observation that you need.

Q I take it then that from your prior testimony that if a woman was to enter a dormitory, she would almost have to close her eyes not to see into the shower room and bathroom facilities?

A Correct. Now I might correct this a little bit here. In the dormitory itself you have a commode and lavatory, but between the two sets of dormitories is a shower where they take their showers. And, of course, you have other lavatories and commodes there. But there is no way you can go through a dormitory or, of couse, go into the shower

room without seeing the individuals in various situations. As a matter of fact, we have a rule that the inmates not be nude, sleep in the nude as such. But of course in warm weather, especially, most of them will sleep in their shorts only in various positions. So at nighttime while they are in bed or even in early evening while they are lying around there, there are very precarious situations where the female or the person patrolling the dormitory would have to see if he or she is doing the job.

Q How important is it when an Officer patrols a dormitory living area to take in all parts of that dormitory, to go into the bathroom facilities and the shower facilities? How important is that and how necessary is that to maintain security in a prison?

A At Frank Lee it is extremely necessary. Now, we are not totally engrossed in the security part like a person escaping. This is not what we are talking about. We are talking about behavioral security. We are able to keep homosexuality almost to nil because of being able to see all areas and patrol all areas readily. We are able to cut down on any serious fights because of this. We cut down on marijuana use, which is most of our drug problem by doing this. If we did not, we would have some serious cuttings and we would have some homosexuality popping up. So it is of the utmost importance in this type of institution, and I am sure in all. But this is the reason we are able to cut down these problems that exist sometimes in your larger institutions, because you can stand at a point and see all areas. You can move into the bathroom and within sixty seconds observe the whole area.

Q Because of your staff requirements, first of all are you up to staff?

A We are minus one security at this point.

Q Because of those staff requirements, are there times

when women must be alone in a dormitory, in control of one dormitory by themselves?

A Yes. As a matter of fact, three nights a week at this point of necessity we have one female with a hundred inmates or between the two dormitories. And the other Officer is like, you know, a hundred and fifty feet away in the other area where the shower is in between them. As a matter of fact, they are cut off by sound or sight in another area.

Q All right. I take it that this woman now patrols all areas in the dormitory, is that correct, including shower and bathroom facilities?

A Correct.

Q If she was prohibited from doing that, do you have any opinion as to whether or not your problems with your cuttings and your marijuana or homosexuality would increase?

A Definitely. Well, of course it would mean that the male Officer or the Officer that was on duty would have to cover all the areas which he could not readily do. And, of course, she would be placed in the front office area, which would at times be of no significance, because we have no need for a post up there.

Q Has the fact that a woman has been assigned to a dormitory by herself created any problems up there at Frank Lee?

A At times it has.

Q And how were those problems manifested to you or made known to you or come to your attention or what are they?

A Well, I can remember one instance whereby there was a near riot that broke out, or at least a couple of inmates picked up bottles and were making some wild threats and agitating the situation. And she, of course, readily came to

the door of the dormitory and was asking them to put their bottles down. Anyway, she was pushed to one side and on the edge of the bed type thing. She didn't hit the floor. And, of course, they proceeded on. There was some throwing and pushing and shoving. But in the meantime, one of the inmates got word to the Officer up in the other area.

Q Was that a male Officer?

A Yes, sir.

Q And what happened?

A He came back and, of course, without any — he really didn't have to make any contact to correct the situation.

Q So a near riot probably was avoided by the male Officer?

A Correct. And by the fact that the inmate notified him. If the inmate hadn't taken the initiative to notify him. of course it could have gotten a little bit beyond that.

Q Have here ever been any other instances at Frank Lee where the attitude of the inmate, as you understand it or as you feel that it is in your opinion, has been shown toward the female Correctional Officer or been manifested toward the female Correctional Officer?

A Yes. Minor instances. Like one instance an inmate grabbed her behind. Other ones at other times have made some remarks. It is an anonymous-type thing, because you can't find the inmate that did it. Then you have whistling or making some sly remark concerning the woman. I have come up in the evening and the Officer was almost screaming to the limits of her voice trying to cut down on the noise and commotion. It wasn't a riot situation, but it was disorderly. You know they were standing on tables and wall partitions, and just generally disorderly.

Q Have you ever seen that condition when a male Officer was in charge?

A No, sir. As a matter of fact, one of the female Of-

ficers less than a month ago reported an incident to me about there being a couple in the shower stall. As she came by they made some obscene movements, uncalled for gestures at her, and she reported it and wanted to know what to do about this type thing.

Q Does the presence of these women in the Correctional Counselor's role, in these contact positions, present an additional burden upon the male Officers, in your opinion?

A Yes. Not only in my opinion, but it is in the complaints I get from them of having to do in some cases a double chore. As a matter of fact, I have heard remarks that sometimes I just as soon do it myself, because you know she can't at times carry her end of the load. Of course, when you only have two Officers and you split fifty-fifty, of course each Officer is expected to do his share. So there has been some complaints on their part that it has placed a more heavy role on them.

Q Would it make the running of the institution easier if these women were not in these contact positions?

A Definitely.

Q Tell me your opinion as to how women Correctional Officers, if at all, should be used in an institution such as yours.

A Well, certainly there is a place for females at Frank Lee. The only objection I have primarily to female Security Officers is the high percentage. If I had adequate male Officers in these key positions, then the female could do things like the telephone, telephone passes, opening the door, handling the mail call situation. And then after the kitchen is secured maybe checking certain areas to see that everything has been properly turned off. So there are a lot of things that a female can do at Frank Lee besides being in the dormitory-shower room. But as I say, my main problem at Frank Lee is the number that I have versus the posts that I have to fill.

[Dep. pp. 25-26].

Q In other words, correct me if I am wrong, what you are saying is if you could fill your posts in the dormitory with men, there would be places for your female Correctional Officers?

A Correct. And then there is another area that they can handle very well in the counseling aspect. Sometimes they can relate to the inmate in certain problems, you know, more readily than the male. So I am saying there is a place for females, especially at Frank Lee. That is if our numerical or percentage number does not become too great.

Q But the place is not in the dormitories?

A I know that is not the place for them, because your effectiveness is not as great. You are just not getting the proper supervision coverage that you would have as if a male Officer was in that post.

Q And that is based upon your experience of two and a half years with female Correctional Officers?

A Correct.

Q And also your experience of approximately a year and a half with no female Correctional Officers at Frank Lee?

A Correct.

MR. NEWMAN: I believe that is all.

CROSS EXAMINATION

BY MR. CARROLL:

Q Mr. Gilmore, I believe your testimony is that there are eleven security persons at Frank Lee and five Youth Development Officers. I am not familiar with a Youth Development Officer.

A No. We have ten security at this time and six . . .

Q Of those ten security, how many are females?

A Of the ten, there are three female.

Q Three female?

A Yes.

[Dep. pp. 26-28]

Q And then there are also five Youth Development?

A Six.

Q Six Youth Development. And how many of those are female?

A Three.

Q Now, what does the Youth Development Officer do?

A The Youth Development Officer is supposed to be primarily in a counselor-type role. The way the description is on the Merit System and the way they are actually used are somewhat different. That is our small staff makes it imperative that we use Youth Development Officers interchangeably in our security roles.

Q So all the Youth Development Officers are used in security at this point?

A Correct. For instance, last Sunday and Monday night we had a Youth Development Officer on the midnight shift.

Q And they are Board of Correction employees also?

A Correct.

Q Now, in the two and a half years that you have been at Frank Lee . . .

A No. I have been there four years.

Q Well, the two and a half years you have been at Frank Lee utilizing female Correctional Officers . . .

A Correct.

Q . . . what is the maximum number of females you have had?

A Six.

Q Have these same six been with you two and a half years?

A No. We have had one for six or seven years that was there when I came.

Q As a Youth Development Officer?

A As a Youth Development Officer. We got the second one, which was a Youth Counselor trainee or security, about

a year and a half ago or two years ago. And then a few months later we got another security and then a little later a Youth Development Officer female.

Q How long have you had six females in the Security force?

A The last one came nine months ago.

Q Okay. Now, I believe that your testimony is that three nights a week there is a female alone in the dormitory; is that correct?

A Yes.

Q And how long has that condition existed?

A It has existed — well, since the last employment. She has already made permanency, so we are talking about eight or nine months.

Q In those eight or nine months this woman has been alone in the dormitory, can you tell me what has happened that you consider bad for security?

A Well, nothing bad for security as such. I am talking about escapes, no.

Q No escapes, no riots?

A No riots. We have had one incident as I was talking about.

Q Has she ever been assaulted other than when she was pushed out of the way?

A No.

Q Never been sexually assaulted?

A No.

Q And she tours both the dormitories and the shower area, right?

A Correct. The two posts interchangingly do the shower room, see. It is between them. So they both are responsible for the shower room and the hallway up to the TV rooms we have.

Q What kind of orders does she have as far as searching

the shower rooms? Do you tell her not to search them but look, but not if males are in there?

A No, our orders have not been changed. It is that you do the total job, no exceptions.

Q When you were at Tutwiler, how many male Correctional Officers did you have under your control?

A I am thinking three, if my memory is correct.

Q How many females; do you remember?

A Thirty-four or thirty-five, something like that.

Q And the males did not do strip searches nor bathroom inspections at Tutwiler?

A No.

Q And Tutwiler while you were there as Warden was a successfully run institution, in your opinion of your own performance?

A Yes. As a male Warden I had limitations, that is especially in the early evening and night. I could not just walk into the bathroom area. I had to give notice. So by doing that, of course, it cut down on my surveillance. I did not walk into a shower room unannounced.

Q But the shwer room is well patrolled by Correctional personnel, was it not?

A By females. No, this was not my post, but I am saying as a Warden in a male institution I can drop into all these areas, where at Tutwiler I was limited or I felt I was, because I didn't feel like I should go in as a male into a shower room while they were nude.

Q If there was an emergency in the shower room would you have gone in?

A Yes. We never had that. As a matter of fact, I have been in the dormitory after bedtime at night, but the females would have preceded me and, of course, made the situation . . .

Q If there was an emergency in the shower room you

[Dep. pp. 31-32]

wouldn't have hesitated to send a male Correctional Officer in the shower room, would you?

A If I had no other choice, no.

Q If a female was available you would have sent her?

A I would have sent her first, correct.

Q I believe earlier in your testimony you stated that women do not command the authority that male Correctional Officers do?

A That is an opinion.

Q That is an opinion?

A Yes.

Q Can you give me a little bit more detailed basis on what you use as a basis for that opinion?

A Well, the young boisterous person, young outgoing person, when you give them authority — you know, I can remember when I was younger that if a woman teacher or my mother told me to do something, I would try her a little bit longer. But if the male teacher or a man in general, you know, you just more readily accept it. You feel like there is more of a threat behind it, a physical threat with him being a man. It is an intangible thing, but it is there and it is real.

Q What do you do to inmates that don't follow orders from female Correctional Officers?

A They are disciplined.

Q How about inmates that don't follow orders from male Correctional Officers?

A They are disciplined.

Q Let's say in the last year how many incidents have you had involving male Correctional Officers, one of these disciplines that we are talking about that resulted from not following orders?

A I am trying to think. I am thinking none to my memory, because this is not a frequent disciplinary thing

[Dep. pp. 33-34]

that we have at Frank Lee.

Q How about with the female Officer, how many have you had in the past year?

A To my knowledge the one is the only one that I am thinking about.

Q Back to the inmate not respecting the female Correctional Officer. In your testimony you indicated in one of these situations the Correctional Officer takes firmer action against the inmate. What does this firmer action consist of?

A Well, not so much taking the firmer action, but the fact that he is present, the fact that he came back. He didn't have to do anything. The thing ceased at that point.

Q But when you say take firmer action, you don't know exactly what he did?

A Well, he didn't have to do anything, I know.

Q And that is from this mother-father thing, the inmate just backed off from him?

A I think so, definitely.

Q Let's say in the period of time that you have been utilizing female Correctional Officers in the full security positions at Frank Lee, how many complaints from the inmates have you had about their particular presence?

A I have had many complaints about her not keeping order, not being able to.

Q Now, when you say her, is that a specific woman you are referring to or just the female Correctional Counselors in general?

A I am talking about generally one of several females and generally we are talking about in the evening from at least after supper to 10:00. That is when they all are under your feet and this is when the noise factor and the little scuffling and these type things occur.

Q Well, it is noisy in there regardless of whether it

[Dep. pp. 34-36]

is male or female Officers, isn't it?

A Yes. There is a certain amount of noise. I am talking to the point of almost unruliness, excessive noise. As a matter of fact, I might relate this concerning the females. The first security that we hire, she was accepted readily by both staff and inmates. She had good relationship and, of course, still does. I think it is probably a positive situation, because we had at that time one out of eight. But then subsequently we have added the others.

Q One out of eight and she was performing the full security duties?

A No. At this point we did not have to put her in the shower room or dormitory.

Q But you have since then done that with the female Correctional Officers?

A Out of necessity. If it were not necessary, I wouldn't have any of the females go into the shower room or in the dormitory.

Q Why wouldn't you have the females go into the shower room and dormitory?

A Because of this matter of exposing the inmate in these various positions, exposing them to the Officer and conversely the inmate having to expose himself in front of an Officer. I mean the inmates themselves don't like it, and the Officer certainly doesn't like it.

Q How many times a night does the Correctional Counselor on duty, whether they be male or female, check the shower area?

A It is sporadic. You are saying from 2:00 in the afternoon until 10:00 at night, you know.

Q A couple of times?

A Oh, fourteen or twenty times.

Q Just walking back?

A Yes. And in the dormitory they count heads every

[Dep. pp. 36-37]

hour. So we are talking about at least eight times that they go by each bed during the 10:00 at night until 6:00 in the morning. Of course, they have to count every hour, so I know they go in there eight times. I know they go through there eight times. I would hope that they go through there more than that.

Q. But, again, you are utilizing women now and they are doing all of these jobs out of necessity?

A Correct.

Q But if you had your druthers, you wouldn't use women at Frank Lee at all, right?

A No, I didn't say that.

Q You wouldn't use them at Frank Lee in security?

A In these contact positions, if I had my choice.

Q Do you see any positive effect of using these women in inside security positions?

A When you say inside . . .?

Q I mean as you are utilizing them now, do you see any positive effects?

A I don't see any.

Q You just see the negative effects of inmate privacy problems?

A No more positive than any other Officer. Of course, some Officers have a more positive effect than others.

Q I mean, there are good and bad female Correctional Officers?

A Oh, yes. You may have a male Officer that is not up to par either.

Q How many complaints have you had from Correctional Officers as to what you alluded to about female Counselors not doing their job?

A Oh, goodness, mucho, lots of those. Of course, they have sort of exhausted them and the complaints have diminished somewhat, because they know that we will have to

[Dep. pp. 37-39]

work in that situation anyway.

Q Have you ever done anything yourself to ease the transition from an all male force to a male-female force? Have you ever done any counseling sessions or anything of that sort with male Officers?

A Oh, goodness. We have had staff meetings and small meetings, because we have had to. Of course, any Officers will have little conflicts between them and we have had sessions between the male Officers and female Officers, and then in smaller groups and then, say, at staff meetings. Of course, the philosophy is that they are employed there and they will be treated like an employee and we will just have to do the best we can with the situation. As a matter of fact, whenever I can now the female is not placed in these positions.

Q Because of your feeling and your opinion that they can't perform in those posts?

A Well, because I know our surveillance and our performance is limited. I am not saying that they don't perform at all. I am talking about in some instances like eighty percent of the job is being done.

Q But yet you can't show me any problems in the past nine months since you have been using women in the dormitory, since you have been using them extensively in your guard force?

A The greatest problem is this male Officer has to do his job plus.

Q So you are saying that that is why there haven't been any problems, because the male Officers are doubling up their particular duties?

A I think that is much of it. Because during the night he will move over to that area and back and forth. He will cover the total area during his post, during the eight hours.

Q Is this by your order?

A That is correct.

[Dep. pp. 39-40]

Q So you have ordered the male to double the duty that he is complaining of?

A Well, I have asked him — of course, we have one Officer in charge of each shift anyway.

Q Are they all males?

A No. Well, we have had females in charge of a shift. It is according to how long they have been there. See, we have an Officer on each shift — see, all of our Officers have been there for many years, several years, at least four years.

Q You mean male and female now?

A Yes. But we have had, for instance, like one Officer is in charge of the second shift. In his absence then the female may be in charge of his shift. We have had females in charge of a shift and this is out of necessity too.

Q How did they perform when they were in charge of the shift?

A We have had no terrific problems.

Q You have told your male Correctional Counselors to watch out, though, when the female Counselors are on duty?

A I have told the Officer in charge, you know, to cover your whole area, but when your female is in this other position I have asked him to check the total area.

MR. CARROLL: I have no further questions.

REDIRECT EXAMINATION

BY MR. NEWMAN:

Q I believe you testified as to the type of inmate that is sent to Frank Lee. Is it usually a nonviolent inmate?

A Yes. As I said before, escapes and violence is not our problem. It is these behavioral things that could be more of a problem than it is now. We are talking about stealing other inmates' stuff or using marijuana or the possibility of homosexuality. You can cut down your surveillance and maybe not cover as heavy as we have covered over the years

and maybe go by without any problems. For instance, we have had just one Officer there to cover the shift. That is the only one there with a hundred and fifty to two hundred men. And if you ask were there any problems, well probably not that particular night. But I am saying to you if you have limited surveillance or if you cut your force down below a minimum, then within a period of time these problems are going to creep in there. Due to the lack of this better surveillance and more intensive surveillance and more firmer hand, we are having more rude-type behavior.

Q What is the primary cause for this?

A It is this not only seeing but correcting the little things. See, all of ours is preventive behavior. If a guy, say, uses a curse word, for instance. If you don't correct him then, three weeks from now he is going to be using some more serious language.

Q Well, is this brought about by the fact that you have female Correctional Officers? Is that a part of it?

A Part of it. And part of it is spreading our staff thinner.

Q Do you think if you have a male to accompany a female at all times you would have better behavior in the dormitory?

A Generally speaking, yes.

Q All right. Relative to the rest of the Alabama Prison System, and I am excluding the Work Release Centers. They are primarily for older people, am I correct, older inmates toward the end of their term?

A Yes.

Q Let's say excluding the Work Release Centers, is Frank Lee Youth Center a good place to be if you were an inmate?

A Well, we like to think it is the best place to serve time. Now, it doesn't mean it is a rest home or you don't

have to work or you are not involved. But when we say the best, it is best for him not only like from being molested or being beaten up on, but also advancing his own knowledge.

Q So then it would be your testimony that relative to the rest of the system it would be a good place to be?

A Yes.

Q If you misbehave at the Frank Lee Youth Center, what are the alternatives that could be used for punishment? Would one of the alternatives be to send a person away from Frank Lee?

A Yes.

Q Would you consider that a pretty harsh punishment?

A Yes, it is. He has to give up his school and in some cases his trade. Also it could affect his release on parole at a certain time. Of course, he loses his custody generally.

Q Do you think this threat of being sent away from Frank Lee has anything to do with the situation out there now as far as quietness of it?

A Oh, it definitely has a deterrent factor.

Q I believe you also testified that you were a Warden at Mt. Meigs four years ago?

A Yes.

Q Let me ask your opinion as to whether or not women should be hired in contact positions in the back dormitories of Mt. Meigs, and if they were, do you feel the results would be the same as you have found at Frank Lee?

A No. The results would be different. I would say versus Frank Lee you would have the greater possibility — as a matter of fact, you can pretty well be assured that it will happen, that the person would be putting herself in a position of being hurt. I think it would be a graver situation if she would be placed in the back halls or dormitories or cell block of what is now called Kilby.

[Dep. pp. 44-45]

Q So would it be fair to say that really at Frank Lee it is not so much the fact that the woman is being in a grave position of being injured as much as it is her lack of control that she exercises?

A Yes. It is the lack of commanding control and this matter of being in the presence of an inmate, of a male person, either unclothed or partially clothed or using the urinal or commode. As a matter of fact, I would say being in the presence of the inmate during these various positions is one of the most critical parts there, and then this lack of total supervision is the other part.

Q Would it be fair to say that any Officer, no matter whether male or female, if they are in the dormitory they would have to confront at some time or another an inmate taking a shower or an inmate using the bathroom?

A There is no getting around it. They would have to close their eyes if they didn't.

MR. NEWMAN: Okay. Thank you.

RE-CROSS EXAMINATION

BY MR. GILMORE:

Q This testimony about these female Correctional Officers in Kilby, for instance, that is all speculation, is it not? I mean, you have no experience with the use of women in anything but Frank Lee?

A I have had no use of women there. But we have out at Kilby — you have to manhandle and you do have stabbings and you do have violent behavior. I am saying that versus Frank Lee.

Q I mean just like you do in any medium-maximum security prison?

A I rather my wife go to the Frank Lee dormitory than to the Kilby halls or the cell block.

Q Have you ever worked in any other system other than

[Dep. pp. 45-47]

Alabama?

A No.

MR. CARROLL: I have no further questions.

MR. NEWMAN: I will ask you if you will waive your signature to the deposition. It is just a matter of correcting any clerical or typing errors. You can't change any substance of anything that you have said. Richard is a very competent Court Reporter.

A I waive the right.

FURTHER DEPONENT SAITH NOT.

[Dep. p. 47]

Caption Omitted*

SUPPLEMENTAL RESPONSE OF JUDSON LOCKE TO INTERROGATORIES OF PLAINTIFFS

Comes now Judson Locke, pursuant to Rule 26 (e)2,-F.R.C.P. and supplements his heretofore filed answers to interrogatories by adding the following:

3. Attached hereto and made a part hereof is Exhibit III(a) which is an update of the educational level of all correctional counselors and/or officers in the Alabama Prison System, as well as a complete list of those who have been recently hired and those who have recently resigned from that date until April 1, 1976.

Respectfully submitted,
WILLIAM J. BAXLEY
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*Certificate of Service Omitted

EXHIBIT III(a)

CO - Correctional Officer CC- Correctional Counselor CCT - Correctional Counselor Trainee

Exhibit No. III-a

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	Educa-tion	Education Up Date
Jessie E. Bowdoin	CC I	#4 Honor Camp	9/11/74	78.8	M	5'81/2"	180	HSGrad	
Ollie F. Dennis	CO	"	1/11/56		M	5'9"	155	8th	
William F. Gray	CO	"	7/23/63		M	5'11"	170	10th	
McArthur Harvey	CCT	"	11/20/75	77.43	M	6'1"	215	1yr.Col	2 yr. Col
Edwin L. Henry	CC I	"	8/14/74	83.64	M	6'5"	205	BachDeg	
Wayne Justiss	CC I	"	6/28/72	78.90	M	6'0"	160	HSGrad.	
Horace C. Moore	CC I	"	9/19/73	75.00	M	6'2"	200	HSGrad/	
Roy L. Pilgrim	CO	"	4/12/72		M	5'11"	165	10th	
Jodie L. Pilgrim	CO	"	2/14/75		M	5'10"	190	8th	
James H. Bettis	CO	ChildersburgW.R.	2/13/74		M	6'0"	235	11th	
Bobby W. Bowling	CC I	"	4/2/74	70.00	M	5'4"	150	HSGrad	
John B. Camp	CC I	"	10/9/74	71.68	M	5'9"	190	HSGrad	
Howard A. Daniels	CCT	"	10/16/75	87.68	M	6'3"	185	3yrCol	
Marie Heath	CC I	"	3/27/74	73.81	F	5'7"	160	BusTra	
Rita T. Ingram	CC I	"	12/18/74	72.51	F	5'3"	123	GED	
Hershel L. McCain	CO	"	2/6/74		M	5'9"	215	9th	
Larry M. Britton	CC I	Alex City P.R.	9/4/74	75.00	M	5'8"	170	HSGrad	1 yr. Col
Mark A. Frank	CC I	"	9/25/74	74.07	M	5'10"	201	3yrCol	Bach. Degree
Earnest L. Harrelson	CC I	"	8/28/74	71.17	M	5'10"	230	1yrCol	3 yr. Col
Randal L. Lucas	CC I	"	9/11/74	70.00	M	5'9"	185	HSGrad	1 yr. Col
Thomas E. Martin	CC I	"	11/20/74	75.00	M	5'10"	195	HSGrad	1 yr. Col
Robin F. Reynolds	CC I	"	9/25/74	71.53	M	5'11"	177	1½yrCol	3 yr. Col
Charles H. Simmons	CCT	"	9/15/75	83.64	M	5'11"	160	B.A.	
Opal A. Harden	CO IF	[illegible]	12/12/72		F	5'7"	165	11th	GED
~~Annie K. Holt~~	CC I	"	10/9/74	78.13	F	5'7"	125	3yrCol	
Phillips, Ida M.	CO IF	"	5/26/71		F	5'2"	165	HSGrad	
Robbins Betty Jo	CC I	"	9/13/72	80.76	F	5'4"	165	HSGrad	
Stewart Cynthia R.	CC I	"	5/27/74	74.76	F	5'5"	130	3yrcol	Bach. Degree
Clayton Joyce A.	CCT	Montg.W.R.	7/30/75	78.64	F	5'6"	134	B.A.	
Johnson Aldean	CCT	"	12/17/75	83.64	M	6'2"	210	B.A.	
Johnson Lee E.	CCT	"	7/30/75	79.58	M	5'11"	165	B.A.	
McCurdy Gwendolyn	CCT	"	12/3/75	78.64	F	5'4"	120	B.A.	
Parrish Kathy M.	CCT	"	12/3/75	78.64	F	5'7"	[illegible]	B.A.	
Potts Eugene D.	CCT	"	12/10/73	88.37	M	5'11"	195	HSGrad	
Tolbert Peggy A.	CCT	"	10/22/75	78.64	F	5'2"	150	B.A.	
Carr Wendell H.	CCT	Atmore P.R.	2/12/75	78.64	M	6'0"	205	B.A.	Masters
Weaver Ronald L.	CC I	"	10/16/73	70.81	M	5'8½"	155	HSGrad	
Williams Clifford F.	CC I	"	8/2/71	72.39	M	5'11"	200	HSGrad	
Witherspoon Mary L.	CCT	"	4/2/75	78.84	F	5'7"	200	B.A.	
~~Benjamin James L.~~	~~CO~~	~~CETA~~	~~11/14/75~~		~~M~~			~~HSGrad~~	~~resigned~~
Cloud Richard	CO	"	11/5/75		M			HSGrad.	

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NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.	Education Up Date
~~Easterling Oscar R.~~	~~CO~~	~~CETA~~	~~12/9/75~~		~~M~~	~~6'4"~~	~~285~~	10th	
Garrett R.E.	CO	"	10/20/75		M	5'6"	154	6th	
Haynes Richard C.	CO	"	11/3/75		M	5'3"	162	10th	
Holt Ivan	CO	"	10/30/75		M			HSD	
Hopper Donald R.	CO	"	9/25/75		M	5'11"	234	HSD	
Parker Ralph	CO	"	10/6/75		M	5'9"	163	9th	
Richardson James C.	CO	"	12/15/75		M	5'7"	184	11th	
Smith Willie C. Jr.	CO	"	11/25/75		M			HSD	
Spellman Patrick	CO	"	10/8/75		M			HSD	
Williams Hilton O.	CO	"	10/15/75		M	6'3"	200	GED	
Worthey Paul E.	CO	"	10/20/75		M	5'11½"	183	HSD	
Aldridge Wilbur	CO	Kilby C.F.	9/23/59		M	5'11"	198	9th	
Allen Carlin	CO	"	7/23/73		M	5'6"	175	HSD	
Anderson Darcy L.	CO	"	2/16/73		M	6'0"	225	9th	GED
Averette James W.	CCT	"	3/7/66	100.00	M	6'0"	175	HSD	
Baker Ray T.	CC I	"	5/22/74	91.00	M	5'11"	185	4yrCol	Bach. Degree, 1yr on
Bennette Robert L.	CC I	"	7/10/74	70.61	M	6'0"	230	HSD	
Best Hillery V.	CO	"	4/19/52		M	5'11"	~~ASS~~	7th	GED
Blankenship James L.	CO	"	10/26/72		M	5'8"	190	8th	
Bone Samuel J.	CO	"	2/16/58		M	5'10"	160	8th	
Bowdoin Herbert R.	CC I	"	6/18/74	78.58	M	6'1"	180	GED	
Braswell Willie	CC I	"	9/16/74	78.64	M	6'4"	240	B.A.	1 yr. on Masters
Bragg Lee	CO	"	2/1/74		M	5'7"	150	11th	
Bruce Sylverster J.	CC I	"	4/1/74	70.00	M	5'11"	165	HSD	
Bush John M.	CO	"	4/29/53		M	5'11"	166	7th	
Colley Floyd C.	CO	"	7/2/57		M	5'11"	158	8th	
Davidson William J.	CO	"	3/8/50		M	6'2"	142	9th	
Dawson Eugene	CO	"	10/24/72		M	5'9"	180	HSD	
Donald Willard L.	CO	"	8/30/72		M	6'1"	202	HSD	
Forbish Leo R.	CO	"	6/18/74		M	5'6"	180	HSD	
Fulmer Bernard O.	CO	"	2/16/61		M	5'8"	193	11th	
Gantt Jimmy Lee Jr.	CC I	"	10/17/74	74.58	M	5'7"	150	B.A.	
Gates James E.	CO	"	3/18/74		M	6'1"	240	HSD	1 yr. Col
Graves Milton III	CC I	"	8/28/73	86.59	M	5'7"	140	3yrCol	
Hall Clarence Jr.	CC I	"	10/17/74	80.25	M	5'10"	188	HSD	1 yr. Col
Hamm Lester E.	CC I	"	1/5/76	76.53	M	5'10½"	170	HSD	
Hebert Dewey	CCT	"	12/9/70	84.47	M	5'7"	150	HSD	
Helms Edd Lee	CO	"	3/4/54		M	5'9"	185	7th	GED
Howard Robert J.	CO	"	4/2/74		M	5'9"	150	HSD	
Hubbard William J.	CO	"	10/17/73		M	5'8"	140	9th	
Huey Samuel R.	CC I	"	1/16/74	79.58	M	5'11"	175	B.A.	

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NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.	Education Up Date
Johnson Marion T.	CO	KilbyC.F.	1/20/69		M	5'8½"	175	HSD	
Jones Benny O.	CO	"	10/10/73		M	5'8"	165	3yrCol	
Jordan Matt D.	CC I	"	3/26/74	75.40	M	5'8"	185	HSD	2 yr. Col
Knighton Harry L.	CO	"	9/2/70		M	6'2"	200	HSD	
Lewis Amos Jr.	CC I	"	8/27/73	75.91	M	6'1"	175	HSD	1 yr. Col
Major Emmett O.	CC I	"	10/24/73	78.64	M	5'10"	145	B.A.	
Malone Arthur C. Jr.	CO	"	6/26/72	98.33	M	5'9"	167	11th	GED
Maxwell Roosevelt	CC I	"	6/6/73	75.61	M	5'5½"	148	HSD	
McAllister Michael F.	CC I	"	4/12/73	81.33	M	5'9½"	204	HSD	1 yr. Col
Miller Dorothy D.	CC I	"	9/13/74	78.99	F	5'4"	130	B.A.	
Mitman Truman W.	CO	"	11/11/70		M	5'11"	148	HSD	
Moncrief Maurice W.	CO	"	4/6/72		M	5'10"	165	Bus.Tr.w/oHS	GED
Moseley Raymond M.	CCT	"	12/27/71	78.56	M	5'10"	150	HSD	
Noles William G.	CO	"	7/13/72		M	5'11"	160	11th	
Norrell Reuben A.	CO	"	9/4/64		M	5'10½"	180	11th	GED
Patterson Dewey H.	CO	"	11/9/71		M	5'10"	195	8th	
Reid Alvah W.	CC I	"	2/10/75	79.98	M	5'7"	150	2yrCol	
Ronoke Eddie L.	CO	"	3/28/74		M	6'0"	186	HSD	2 yr. Col
Sanford Robert L.	CC I	"	2/19/74	83.33	M	5'8"	210	HSD	
Shumaker Billie S.	CO	"	6/23/59		M	6'2"	205	HSD	
Smith Eugene	CC I	"	9/19/74	78.64	M	5'4"	145	B.A.	
Smith Hardwick	CO	"	10/17/73		M	5'10½"	190	HSD	
Smith Albert J.	CO	"	2/12/73		M	6'2"	210	HSD	
Taunton Jimmie W.	CC I	"	2/13/73		M	5'11"	175	GED	
Waid Pinkney A.	CO	"	7/2/57		M	6'0"	230	BusTrnw/oHS	GED
Ward Robert Lee	CC I	"	1/13/61	84.15	M	5'9"	160	HSD	
Webster James O.	CC I	"	10/10/75	77.64	M	6'0"	160	HSD	3 yr. Col
Williams Ernest R.	CCT	"	7/14/75	87.67	M	6'5½"	160	B.A.	
Wright Grady	CO	"	11/24/53		M	5'9½"	150	7th	
Aughtman Lester C.	CCT	G.K.FountainCC	9/30/74	71.02	M	5'11"	140	GED	
Baggett Travis S.	CO	"	10/7/65		M	6'0"	185	HSD	
Baggett Roy A.	CO	"	10/1/69		M	6'1"	165	HSD	
Ballard Elbert J.	CO	"	8/17/61		M	5'10"	190	11th	
~~Bazley Vernon E.~~	CC I	"	2/20/74	70.00	M	6'0"	210	HSD	
Bell Leonard H.	CO	"	10/29/69		M	6'3"	227	10th	
Bilbo Charles L.	CCT	"	10/17/75	75.45	M	5'6"	140	1yrCol	
Blanton William O.	CO	"	11/2/71		M	5'8"	155	11th	
Bodiford Charlie E.	CC I	"	2/7/73	76.02	M	5'7"	140	HSD	
Bragg Robert C.	CO	"	8/13/70		M	5'11"	190	8th	
Brown Isaac N.	CC I	"	10/16/68	83.09	M	5'11"	190	HSD	
Brothers Grady E.	CO	"	9/7/65		M	5'11"	194	HSD	

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NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.	Education Up Date
Bryars Oddie	CO	G.K.FountainCC	2/25/74		M	5'6"	170	11th	
Calhoun Norman C.	CO	"	4/27/71		M	5'8"	130	8th	
Cannon Billy H.	CO	"	10/25/72		M	6'2"	265	HSD	
Carlton Tommy D.	CC I	"	12/17/73	70.36	M	5'8"	152	GED	
Carver James E.	CC I	"	10/29/69	79.89	M	6'1"	200	HSD	
Carlee Joseph M.	CO	"	3/1/66	70.43	M	6'0"	200	10th	
Caraway Edward E.	CO	"	10/15/73		M	5'11½"	215	10th	
Caraway Collin L.	CO	"	7/1/69		M	5'11"	180	8th	
Caraway James T.	CO	"	10/19/73		M	6'0"	185	9th	
Coffey Ladd L.	CC I	"	6/12/64	86.15	M	6'2"	174	2yrCol	
Crawford Andrew F.	CCT	"	10/8/75	76.32	M	5'8"	180	2yrCol	
Dandra William J.	CCT	"	6/7/72	72.89	M	5'8"	145	GED	
Daughtry Adam	CO	"	7/17/73		M	5'9"	150	9th	
~~Davis Larry V.~~	CCT	"	9/24/75	70.40	M	5'9"	220	GED	
Donaldson Clifford J.	CO	"	2/15/73		M	5'11"	155	10th	
Dorriety Billie H.	CC I	"	4/6/73	70.51	M	6'0"	200	HSD	
Dorriety Jerry W.	CCT	"	8/14/74	72.43	M	6'3"	190	9th	GED
Downey John R.	CO	"	12/13/66		M	5'9"	155	8th	
Downey T.C.	CO	"	10/29/69		M	5'10"	185	8th	
Dreadin Arthur C.	CO	"	9/17/71		M	6'0"	190	10th	
Ellis Bennie L.	CO	"	11/13/72		M	5'10"	170	8th	
Elloitt I.V.	CO	"	9/6/68		M	5'9"	175	HSD	
English Jessie L.	CO	"	5/4/54		M	6'0"	134	7th	
English Hugo	CO	"	4/28/69		M	6'0"	192	10th	
Etheridge Bruce C.	CO	"	11/10/53		M	5'11"	225	7th	GED
Fowler Willie R.	CO	"	3/24/67		M	5'11"	172	9th	
Godwin Alton	CO	"	8/27/75		M	5'6½"	160	8th	
Gregg Euby	CO	"	4/4/60		M	5'11"	170	11th	
Griffin Bill	CO	"	10/21/70		M	5'8"	185	GED	
Hall Charles M.	CO	"	8/27/75		M	5'10"	188	10th	
~~Hall Willie F.~~	CO	"	11/10/72		M	6'2"	230	11th	
Hall Jack	CO	"	8/27/75		M	6'3"	162	8th	
Hannack Julian O.	CCT	"	3/12/75	76.17	M	5'10"	200	HSD	
Harrison William T.	CO	"	11/30/73		M	6'1"	195	9th	

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NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	EDUCATION	Education Up Date
Hayes Hayward	CC I	G.K. FountainCC	12/17/69	80.84	M	6'1"	185	HSD	2 yr. Col
Haynie Luke	CC I	"	5/5/71	79.42	M	5'11"	197	GED	
Hines Glen	CO	"	7/15/70		M	6'0"	165	8th	
Hinson L C	CO	"	5/3/71		M	5'10"	225	8th	
Holdaway Jack M	CO	"	6/1/69		M	5'9"	180	8th	
Jackson Gordon	CC I	"	2/20/74	72.15	M	5'11"	225	2yrCol	
Johnson Zrbie S	CC I	"	10/7/65	82.88	M	6'1"	180	HSD	
Johnson Katie M	CCT	"	3/26/75	78.64	F	5'6"	143	B.A.	
Johnson Aubrey	CO	"	7/30/73		M	5'8"	175	8th	
Jones Woodrow W	CC I	"	1/27/66	77.88	M	6'0"	215	9th	GED
King Donald E	CCT	"	6/1/73	71.93	M	5'10"	160	GED	
Knight Harvey	CCT	"	10'14'75	75.00	M	5'8"	150	HSD	
Knowles Delmas R	CO	"	6/1/62		M	5'10"	183	HSD	
Lane Otto	CO	"	4/8/59		M	5'8"	190	8th	
Leatherwood Douglas	CC I	"	2/9/72	77.64	M	5'10"	153	HSD	
Lee Robert	CO	"	5/8/74		M	5'9"	135	8th	
Mabry Philip T	CCT	"	11/10/75	72.69	M	5'11"	175	Bus.Tr.w/HSD	
Mancil Herbert W	CO	"	10/3/73		M	5'10"	180	HSD	
McKinley Geo Washto	CO	"	8/10/61		M	5'10"	190	10th	
McKinney James E	CCT	"	5/27/74	71.37	M	6'1"	230	GED	
Mosley James L	CC I	"	12/31/69	79.32	M	5'6"	175	HSD	
Nelson Luther M	CCT	"	11/8/74	75.91	M	6'2"	210	GED	
Oswald Hayward J	CO	"	10/1/69		M	5'5"	155	9th	
Owens Walter T	CO	"	1/29/73		M	5'9"	180	8th	
Phillips Charles W	CO	"	12/3/69		M	5'8"	140	10th	
Quimby Walter B	CO	"	11/1/66		M	5'10"	185	1yrCol	2 yr. Col
Ray James E Jr.	CC I	"	8/16/72	76.53	M	6'0"	200	HSD	1 yr. Col
Redmon Bertha L	CC I	"	3/11/73	70.00	F	5'7"	147	GED	
Richardson Eddie	CC I	"	10/9/74	80.83	M	6'1"	225	B.A.	
Roberts L Junior	CO	"	11/10/54		M	5'8"	145	11th	
Ross Albert J	CO	"	8/1/63		M	5'10"	182	HSD	
Salter Charles W	CO	"	12/10/73		M	5'10"	165	GED	
Shipp James V	CO	"	10/7/71		M	5'9½"	155	8th	
Shipp James E	CO	"	11/7/72		M	5'11"	145	HSD	
Smith Charles B Jr	CCT	"	10/20/75	75.00	M	5'11"	155	HSD	
Smith Chester	CO	"	6/9/69		M	5'8"	200	8th	
Smith Chesley	CO	"	4/5/71		M	5'6"	195	HSD	
Smith Carl	CO	"	8/27/75		M	5'8"	147	10th	
Smith Roy H	CO	"	1/22/74		M	5'9"	160	9th	

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION		Education Up Date
Springs Brenda	CCT	G.K.Fountain	12/10/75	78.64	F	5' 8''	145	B.A.	
Taylor Donald L	CCT	"	12/29/75	71.58	M	5'9"	153	1 yr Co	
Timothy James C	CO	"	10/01/69		M	5'7"	180	9th	
Timothy Andrew E	CO	"	07/09/73		M	5'6"	180	10th	
Turk James	CO	"	08/13/63		M	6'0"	244	HSGrad	
Ward William D	CCT	"	12/08/75	81.19	M	5'11"	155	M.S.	
Watford Alton C	CO	"	08/01/69		M			HSD	
Williams Albert F	CC I	"	10/01/66	79.73	M	5'10"	180	G.E.D.	
Wilson Bibb H	CCT	"	07/16/75	75.00	M	5'10"	175	HSD	
Williams Albert E	CC I	"	12/04/74	70.40	M	5'11"	160	HSD	2 yr. Col
Willson Dudley W	CO	"	07/16/67		M	5'9"	285	8th	
Womack Ralph	CO	"	09/04/53		M	5'9"	140	8th	
Achimon Archie U	CO	Draper	12/01/63		M	5'8"	175	HSD	
Barrett Cloyce E	CO	"	08/24/61		M	5'10"	167	HSD	
Barrett Clyde A	CO	"	09/10/68		M	5'8"	138	HSD	
Bedford Leo Wm	CC I	"	09/09/63	84.15	M	6'0"	164	C.C.	
Bibb Robert	CC I	"	03/27/72	77.67	M	5'6"	155	HSD	
Blankenship John	CO	"	09/23/68		M	5'9"	185	10th	
Boyer Jim Henery	CO	"	07/16/69		M	5'7"	150	HSD	
Campbell James W	CO	"	11/29/72		M	5'8"	145	8th	
Carr James L	CO	"	06/23/71		M	5'8"	155	9th	GED
Checkler Horace R	CO	"	01/19/72		M	5'11"	190	11th	
Cline Don C	CC I	"	02/14/73	90.33	M	6'1"	235	GED	
Collins Lloyd	CC I	"	10/17/73	82.60	M	5'6"	176	1yr Col	2 yr. Col
Colquitt Henry	CO	"	06/30/72		M	5'9"	170	10th	
Colley Harvey Allen	CO	"	03/07/63		M	6'4"	217	HSD	
Conner Warren L	CO	"	03/04/69		M	6'0"	157	6th	10th grade
Dennis Joe F	CCT	"	11/03/75	78.66	M	5'8"	185	HSD	3 yr. Col
Daniels Leeposey	CCT	"	06/11/75	78.64	M	6'0''	164	BA	
Devaughn Joseph L	CO	"	02/16/67		M	5'8"	209	9th	
Devaughn Hardy	CO	"	09/29/75		M	6'1"	195	11th	
Dillinger Bert E	CC I	"	04/17/74	77.95	M	6'0"	145	HSD	2 yr. Col
Driver James E	CO	"	09/03/74		M	5'10"	156	HSD	
Easterling Rufus T	CO	"	07/16/68		M	6'5"	280	8th	
Edwards Floyd	CCT	"	08/22/66	78.05	M	5'9''	178	HSD	
Eiland Marion	CO	"	08/24/72		M	5'6"	160	9th	
Elliott John J	CO	"	09/30/74		M	6'2"	200	GED	

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Faulk Billy	CO	Draper	11/05/74		M	5'11"	170	10th	
Frost DONald	CCT	"	06/18/75	93.11	M	5'10 "	195	BA	
Fuller Joseph W	CO	"	11/04/74		M	6'0"	222	11th	
Garmon Jewel L	CO	"	08/07/57		M	6'3 "	182	9th	
Geoghegan Claude	CC I	"	10/01/74	75.71	M	5'6"	175	HSD	1 yr. Col
Gibbons Halfmann	CO	"	01/18/72		M	5'11"	180	11th	
Glenn James H	CCT	"	11/16/71	83.00	M	5'8"	170	HSD	
Gray Richard R	CO	"	09/19/61		M	5'11"	206	11th	GED
Hayes Fred L	CC I	"	10/09/74	75.00	M	6'0"	210	HSD	
Herrod John W	CO	"	05/24/71		M	5'8"	165	HSD	
Holman Joe C	CO	"	09/18/72		M	5'8"	162	10th	
Horsley George W	CO	"	04/17/72		M	6'0"	250	10th	
Hughes Richard M	CC I	"	06/14/74	75.37	M	5'11"	165	3yr Col	Bach. 2 yr. on Maste
Johnson Eddie	CC I	"	02/01/74	75.10	M	5'9"	168	HSD	
Jones Doris	CC I	"	10/30/73	78.14	F	5'8"	190	HSD	
Jones James Carl	CC I	"	08/24/64	79.10	M	5'9"	168	HSD	
Kirland Bobby	CO	"	10/01/75		M	6'0"	195	1yr COl	2 yr. Col
Little Herman	CO	"	08/08/67		M	5'11"	151	10th	
Littlejohn James W	CO	"	02/02/57		M	6'2"	190	9th	
Lowman James C	CC I	"	12/17/73	93.33	M	5'8"	145	3yr Col	3½ yr. Col
McDonnald Edward	CC I	"	10/09/74	75.00	M	5'7"	138	GED	1 yr. Col
McGee Henrietta E	CCT	"	07/21/75	79.40	F	5'5"	142	BA	
McGowin James D	CO	"	02/23/72		M	5'6"	140	HSD	
Mitchell EDward	CO	"	10/18/59		M	6'2"	155	HSD	1 yr. Col
Murchison Beno L	CO	"	01/09/61		M	5'11"	160	HSD	2 yr. Col
Murchison Leonard O	CO	"	09/18/68		M	5'11"	150	11th	HSD
Noah Thomas	CO	"	3/22/66		M	5'8"	170	8th	
Noah James	CO	"	9/21/67		M	5'11"	199	11th	
Osteen Henry L.	CO	"	8/1/63		M	5'10"	152	10th	
Owens Charles H.	CO	"	12/20/66		M	5'8"	172	10th	
Parker Roger K.	CC I	"	12/4/72	70.86	M	6'0"	157	HSD	
Plyler Barnes S.	CO	"	5/4/67		M	5'11"	223	HSD	
Randall Charles T.	CO	"	3/12/73		M	6'1½"	168	10th	
Rich Everett L.	CC I	"	10/6/66	76.71	M	6'0"	190	GED	
Robinson Theodore	CO	"	7/18/53		M	5'7"	165	8th	
Roper Clemmie C.	CC I	"	12/3/73	75.00	M	5'11"	163	HSD	
Russell Raymond E.	CC I	"	6/19/74	75.00	M	5'10"	157	GED	3 yr. Col
Sansom David E.	CO	"	10/24/73		M	5'8"	155	11th	GED 1 yr. Col
Scroggins John B.	CO	"	10/24/73		M	5'7"	150	HSD	
Simmons Clester H.	CO	"	4/24/68		M	6'4"	254	10th	
Smith Hollis L.	CC I	"	11/28/73	70.36	M	5'7"	160	HSD	
Smith James H.	CO	"	6/19/69		M	6'1"	235	12th	

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Stearns Arvel C.	CO	Draper	3/18/63		M	6'0"	194	10th	GED
Steadham James F.	CO	"	5/14/74		M	6'0"	175	BusTrHSD	2 yr. Col
Thornell Max	CC I	"	6/15/72	82.73	M	5'11"	176	GED	2 yr. Col
Thompson Robert C.	CC I	"	10/18/73	74.78	M	6'2"	225	HSD	
Walker Murray L.	CO	"	7/15/70	85.29	M	6'2"	230	HSD	
Walker Leon G.	CO	"	12/6/52		M	5'8"	165	7th	
Ward Jerremah	CO	"	4/16/63		M	5'11"	150	11th	
Watkins James C.	CO	"	9/26/75		M	5'7"	185	12th	
Wells Johnny E.	CO	"	3/28/66		M	5'8"	198	9th	GED
Whitt Ethelrine P.	CCT	"	7/21/75	78.64	F	5'8'	146	B.A.	
White Marion R.	CO	"	2/20/68		M	5'11"	170	10th	
Wiggs Joe Jr.	CO	"	11/24/64		M	5'11"	170	10th	
Wilson Ernest T.	CC I	"	2/28/73	80.24	M	5'9"	175	B.S.	3 yr. on Masters
Wilson Randall G.	CO	"	10/1/75		M	5'10"	160	HSD	
Wright William A.	CO	"	6/12/67		M	5'11"	151	10th	
Wright Ralph W.	CO	"	1/2/69		M	5'9"	174	6th	11 grade GED

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	Ed.	Education Up Date
Blankenship, Pauline C.	CO	Tutwiler	01-21-70		F	5'0"	140	9th	GED 3 yr. Col
Brown, Essie D.	CC I	Tutwiler	10-26-73	79.41	F	5'5"	135	Bach. D.	
Cobb, Virginia K.	CO	Tutwiler	07-18-73		F	5'6"	120	HSD	
Collier, Mary Sowell	CCT	Tutwiler	10-16-72	81.19	F	5'6"	135	1 yr co	Bach. Degree
Davis, Barbara J.	CCT	Tutwiler	09-03-75	81.39	F	5'5"	145	Med.	
Duke, Benjamin C.	CO	Tutwiler	06-01-57		M	5'3"	160	8th	
Estes, John R.	CO	Tutwiler	11-03-72		M	6'0"	175	HSD	
Gossett, Allen L.	CC I	Tutwiler	09-16-63	79.15	M	5'7"	180	HS Grad	
Gossett, Montez L.	CO	Tutwiler	06-16-68		F	5'6"	130	HS Grad	
Goodman Eunice Hila	CC I	Tutwiler	09-13-59	79.40	F	5'7"	155	HS grad	
Gorge, Merla E.	CC I	Tutwiler	02-11-55	79.40	F	5'8"	130	HSD	
Hill, Harvey H., Jr.	CCT	Tutwiler	05-07-75	80.30	M	6'4"	212	HSD	
Hollyfield, Helen	CC I	Tutwiler	02-12-74	70.00	F	5'5"	142	HSD	
Holt, Mary C.	CO	Tutwiler	08-16-63		F	5'4"	180	11th	
Holley, Arlene T.	CO	Tutwiler	10-16-68		F	5'11"	130	12th	
Jefferson, Ethel R.	CCT	Tutwiler	01-22-75	78.64	F	5'5"	131	Bach. D.	
Lee, Claudine	CCT	Tutwiler	01-02-75	78.64	F	5'6"	120	Bach D/	
Matthews, Virginia	CCT	Tutwiler	07-16-63	79.15	F	5'3½"	115	HSD	
Morrison, Sarah	CO	Tutwiler	12-30-64		F			HSD	
Murchison, Katherine	CO	Tutwiler	03-24-67		F	5'2"	130	HSD	
Robinson, Florence F.	CO	Tutwiler	09-16-66		F	5'7"	155	HSD	
Ross, Gladys I	CO	Tutwiler	11-10-71		F	5'4"	150	10th	
Stapp, Joyce C	CCT	Tutwiler	07-02-75	81.19	F	5'5"	170	U.S. J.	
Vinson, Jeanetta Y.	CC I	Tutwiler	11-07-73	72.64	F	5'5"	134-	Bach D.	
Wood, Mary Lee	CO	Tutwiler	06-16-67		F	5'1"	148	HSD	
Wood, Adolphe L.	CO	Tutwiler	04-13-72		M	5'7"	200	10th	
Baugh, James C.	CO	Holman	06-06-72		M	5'8"	139	8th	
Giles, Lester V.	CCT	Holman	11-07-75	75.76	M	5'3"	160	HSD	
Blackburn, William C.	CO	Holman	10-23-69		M	5'11"	190	10th	
Blackmon W.O.	CO	Holman	05-07-74		M	5'7"	150	8th	GED
Boone, Henry C.	CO	Holman	06-06-74		M	5'2"	270	10th	
Boutwell, Raymond	CCT	Holman	12-05-75	70.07	M	6'0"	205	HSD	
Boyd, Martha A.	CCT	Holman	03-27-75	74.58	F	5'3"	127	12th	1 yr. Col
Branch, Willie	CO	Holman	09-21-72		M	6'3"	133	10th	GED
Brooks, Fred	CO	Holman	08-13-70		M	5'10"	135	8th	
Bryars, Chester	CO	Holman	08-26-73		M	5'7"	170	8th	
Carrol, Marshall	CCT	Holman	07-26-74	80.80	M	6'3"	180	HSD	
Coleman, Charles H.	CCT	Holman	05-24-75	73.69	M	6'0"	200	HSD	
Coleman, John D.	CO	Holman	05-13-70)		M	5'8"	187	9th	
Coleman, Joseph R.	CO	Holman	07-30-75		M	5'6"	135	8th	
Cruthfield, James J.	CO	Holman	05-18-70		M	5'10"	230	11th	

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION - Ed.	Education Up Date
Cruit, Riley M.	CO	Holman	03-30-74		M	6'0"	135	10th
Davidson, Lavaughn	CCT	Holman	11-06-75	72.13	M	6'1"	210	GED
Davis, Jerry M.	CO	Holman	02-12-75		M	5'11"	155	9th
Dean, Stephen L.	CC I	Holman	07-31-74	70.55	M	5'10"	215	HSD
Dignan, Richard G.	CC I	Holman	06-25-74	76.68	M	5'3"	162	1 yr col 3 yr. Col
Dixon, Ira L.	CO	Holman	08-03-73		M	6'	170	8th
Dunn, Joe	CO	Holman	05-18-70		M	5'10"	165	8th
Dyress, Donnie F.	CCT	Holman	01-21-71	74.22	M	5'11"	264	HS Grad
Ellis, James T.	CO	Holman	09-02-69		M	6'	190	8th
English, Bobby R.	CO	Holman	07-26-73		M	5'7"	160	HSD
Floyd, James C.	CO	Holman	09-09-74		M	6'2"	190	8th GED
Flowers, Julius J.	CO	Holman	01-24-75		M	6'2"	170	8th
Foster, Donnie	CO	Holman	02-15-74		M	5'11"	165	9th
Fralick, Thomas J.	CO	Holman	01-04-72		M	5'11"	210	11th
Gibbs, Willie E.	CO	Holman	06-29-73		M	5'6"	135	10th GED
Grant, Elmore V.	CO	Holman	05-13-70		M	5'8"	180	10th
Hank, Homer L.	CCT	Holman	02-26-73	78.54	M	5'9"	140	HSD
Harville, Norman	CO	Holman	11-12073		M	5'10"	170	8th
Hayes, Bryan	CCT	Holman	11-25-75	72.59	M	6'2"	205	1 yr col
Hixon, William T	CCT	Holman	12-17-69	75.02	M	6'2"	185	GED
Hodgen, James R.	CC I	Holman	09-12-73	75.25	M	5'7"	162	GED
Holt, Isaac J.	CC I	Holman	02-04-72	79.67	M	6'0"	210	HS GRad 3 yr. Col
Hollinger, Dennie C.	CO	Holman	09-17-71		M	6'0"	204	10th
Johnson, Larry D.	CCT	Holman	03-05-74	70.75	M	6'0"	158	GED
Jones, Robert D.	CCT	Holman	12-22-75	75.00	M	5'3"	180	Less than 1 yr co
Kirby, David B.	CCT	Holman	12-29-75	71.12	M	6'0"	295	GED
King, Earl D.	CO	Holman	05-16-68		M	6'3"	175	10th
Kitzinger, Ronald W.	CCT	Holman	07-21-75	75.00	M	5'3"	150	GED
Lee, Roy J.	CO	Holman	03-20-63		M	6'0"	165	9th grad GED
Luker, Ingram	CO	Holman	05-13-70		M	5'9"	150	8th GED
Mason, Marvin M. Jr.	CO	Holman	11-06-74		M	5'11'	145	9th GED
McInally, Earl	CO	Holman	01-22-74		M	6'0"	200	11th
Messick, Grimes W.	CO	Holman	09-06-74		M	5'3"	200	11t
Moore, Elizabeth	CC I	Holman	01-30-74	70.20	F	5'5"	122	HS Gr.. GED
Oswald, James R.	CO	Holman	01-25-73		M	5'10"	133	9th
Overstreet, Calvin M.	CO	Holman	08-13-70		M	6'2"	180	10th
Parker, Leroy	CO	Holman	11-06-74		M	6'0"	185	8th
Payne, Dewey E.	CC I	Holman	04-20-72	81.04	M	6'2"	225	GED
Peacock, Clarence A.	CO	Holman	09-26-73		M	5'11"	203	HS Grad
Pugh, John H.	CO	Holman	08-02-73		M	5'7"	170	8th

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	ED.	Education Up Date
Qualls Juby J.	CO	Holman Prison	6/6/72		M	6'2"	190	8th	
Quimby Kenneth R.	CO	"	7/1/74		M	5'9"	225	HSD	
Raines Jessie H.	CCT	"	2/20/73	73.15	M	6'0"	185	GED	
Raines Joseph C.	CC I	"	9/13/72	78.00	M	5'11"	200	HSD	1 yr. Col
Rollin William	CC I	"	2/22/74	70.00	M	5'6"	175	GED	
Ryals Charles W.	CO	"	4/11/63		M	5'8"	181	10th	
Seale Otha	CO	"	12/6/71		M	5'9"	180	HSD	
Seale Leon	CO	"	7/7/72		M	5'11"	190	10th	
Sellers Edward L.	CO	"	4/29/74		M	6'2"	210	6th	
Sirmon Richard I.	CO	"	5/29/74		M	6'2"	165	10th	GED 1 yr. Col
Smith James M.	CO	"	5/18/70		M	5'7"	135	9th	
Stabler Frank W.	CO	"	11/12/74		M	5'11"	180	8th	
Stewart William W.	CCT	"	12/31/69	80.49	M	5'9"	147	GED	
Steele Henry R. Jr.	CO	"	4/17/74		M	5'9"	180	8th	
Taylor Xindle M.	CC I	"	2/3/71		M	5'11"	190	HSD	
Tolbert Harry T.	CO	"	12/4/72		M	6'1"	185	8th	GED
Tolbert Leroy	CO	"	2/11/70		M	5'9"	147	8th	
Welch Mack O.	CCT	"	10/9/75	75.00	M	5'11½"	168	HSD	
Whatley William P.	CO	"	11/14/73		M	5'11"	175	GED	
White George L.	CO	"	7/2/73		M	5'8"	135	8th	
Wiggins Elbert R.	CC I	"	10/12/71	73.56	M	6'0"	152	B.A.	
Wright Terry T.	CC I	"	3/26/73	74.53	M	6'1"	170	HSD	
Carter Mary C.	CC I	B'ham.P.R.	1/29/75	78.84	F	5'3"	127	B.A.	
Ceaphus Leslie C. Jr.	CC I	"	7/11/73	84.80	M	5'11"	175	1yrCol	A.A.
Dewitt Robert H.	CCT	"	12/17/75	89.22	M	6'5"	245	Masters	
Everhart Charles E.	CC I	"	10/19/73	77.85	M	5'10"	177	2yrCol	A.A.
Harding Nancy C.	CC I	"	9/17/73	70.00	F	5'5"	130	HSD	
Hightower Royzell	CC I	"	11/12/73	77.64	M	5'5"	140	1yrCol	A.A.
Jordan John C.	CC I	"	4/4/73	78.10	M	6'0"	190	2yrCol	Bach. Degree
Bryars Edith M.	CC I	MobileP.R.	1/30/74	78.64	F	5'9½"	170	B.A.	1½yr. on Masters
Ellisor Thomas M. Jr.	CC I	"	1/16/74	92.03	M	5'11"	201	Master	
Evans Donald J.	CC I	"	10/9/74	81.10	M	5'9"	195	3yrCol	Bach. Degree
McGill John C.	CC I	"	1/30/74	73.66	M	5'10"	190	2yrCol	3 yr. Col
Ruffin Barbara A.	CC I	"	2/13/74	74.83	M	5'2"	123	B.A.	1½ yr. on Masters
Thomas Ernest Jr.	CC I	"	3/13/74	78.15	M	5'10½"	168	HSD	
Bray Jessie S.	CCT	Frank LeeYC	1/15/75	77.53	M	5'8"	130	B.A.	
Daniels Olivia	CCT	"	7/30/75	78.64	F	5'3"	129	B.A.	
Dowdy Cheril A.	CC I	"	10/24/73	78.64	F	5'11"	160	B.A.	
Foreman James W.	CO	"	7/1/67	81.25	M	5'11"	190	10th	
Harris Richar M.	CC I	"	1/14/72	82.00	M	5'7"	160	GED	
Neeley Sidney E.	CO	"	10/29/69		M	5'7"	170	GED	
Smith Leonard E.	CO	"	2/15/68		M	5'11"	170	8th	
Smith Carl B.	CO	"	5/23/73		M	6'0"	180	10th	

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Recently hired

Exhibit 111a

NAME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	EDUCATION
Dafney, Lewis P.	Corr. Off.	CETA	1-15-76		M	5' 9½"	153 lbs.	11 grade
Reach, Charles	Corr. Cslr. Tr.	Draper	1-14-76	78.64	M	5' 11"	135 lbs.	BA
Sullivan, Michael	Corr. Cslr. Tr.	Mobile Wk. Rel.	1-14-76	81.10	M	6' 1"	185 lbs.	3 yr. Col
McDade, Elizabeth	Corr. Cslr. Tr.	Mont. Wk. Release	1-14-76	81.09	F	5' 9"	220 lbs.	BS
Allen, Walter K.	Corr. Cslr. Tr.	Holman	1-26-76	78.64	M	6' 0"	190 lbs.	BS
Cephas, Gwendolyn	Corr. Cslr. Tr.	Kilby	2-2-76	77.42	F	5' 5"	135 lbs.	BS
Jackson, Edgar J.	Corr. Cslr. Tr.	Mont. Pre-Release	2-18-76	78.84	M	6' 0"	175 lbs.	BS
Torniss, Leon	Corr. Cslr. Tr.	Mont. Pre-Release	2-23-76	79.60	M	5' 9"	155 lbs.	BS
Cousins, Stephonie	Cor. Cslr. Tr.	Holman	2-25-76	78.64	F	5' 4"	160 lbs.	BS
Crenshaw, Richard	Corr. Cslr. Tr.	Holman	2-25-76	71.17	M	5' 8"	170 lbs.	2 yr. Col
White, Allen	Corr. Cslr. Tr.	Fountain	2-25-76	70.66	M	5' 11"	175 lbs.	GED
Pounsey, Allie	Corr. Cslr. Tr.	Holman	2-25-76	70.00	M	5' 8"	155 lbs.	GED
Baker, James M.	Corr. Cslr. Tr.	Holman	2-25-76	70.00	M	5' 9"	152 lbs.	1 yr. Col
Green, Eddie M.	Corr. Cslr. Tr.	Holman	2-25-76	72.03	M	5' 9"	175 lbs.	2 yr. Col
Creech, Robert	Corr. Cslr. Tr.	Holman	2-25-76	71.63	M	6' 0"	200 lbs.	GED
Davison, Charles	Corr. Cslr. Tr.	Holman	2-25-76	70.51	M	5' 6"	152 lbs.	HSG
McAuley, Kathryn	Corr. Cslr. Tr.	Fountain	2-25-76	70.51	F	5' 5"	200 lbs.	HSG
Watson, John S.	Corr. Cslr. Tr.	Fountain	2-25-76	70.40	M	6' 4"	210 lbs.	HSG
Clinner, Betty	Corr. Cslr. Tr.	Fountain	2-25-76	70.00	F	5' 9"	195 lbs.	HSG
Gore, Delmar E.	Corr. Cslr. Tr.	Kilby	2-26-76	72.08	M	5' 9"	190 lbs.	HSG
Grady, Chester	Corr. Cslr. Tr.	Kilby	2-25-76	76.76	M	5' 8"	152 lbs.	3 yr. Col
Giles, Jessie	Corr. Cslr. Tr.	Kilby	2-26-76	76.45	M	6' 2"	220 lbs.	3 yr. Col
Cole, Thomas	Corr. Cslr. Tr.	Kilby	2-25-76	71.27	M	6' 0"	190 lbs.	HSG
Stubbs, Thomas	Corr. Cslr. Tr.	#4 Honor Camp	2-25-76	76.27	M	5' 9"	175 lbs.	1 yr. Col
Eaton, Cliff	Corr. Cslr. Tr.	Kilby	2-25-76	76.15	M	6' 0"	212 lbs.	3 yr. Col
Culp, Joe H.	Corr. Cslr. Tr.	Draper	3-12-76	72.67	M	6' 4"	180 lbs.	1 yr. Col
Coley, Jerone	Corr. Cslr. Tr.	Kilby	3-17-76	78.91	M	6' 1"	165 lbs.	3 yr. Col
Mitchell, Wendall	Corr. Cslr. Tr.	Draper	3-17-76	71.42	M	6' 2"	205 lbs.	HSG
Jenkins, Larry	Corr. Cslr. Tr.	Draper	3-18-76	76.27	M	6' 3"	160 lbs.	HSG
Nelan, Lawrence	Corr. Cslr. Tr.	Kilby	2-25-76	75.51	M	6' 0"	175 lbs.	HSG
Hartley, James	Corr. Cslr. Tr.	Kilby	2-25-76	75.15	M	5'11"	174 lbs.	HSG
Danley, William	Corr. Cslr. Tr.	Kilby	2-25-76	75.10	M	5' 9"	200 lbs.	GED

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AME	TITLE	PLACE OF EMPLOYMENT	DATE EMPLOYED	GRADE	SEX	HEIGHT ON APPLICATION	WEIGHT ON APPLICATION	EDUCATION

IN ADDITION, THE FOLLOWING CORRECTIONAL OFFICERS OR CORRECTIONAL COUNSELORS HAVE RESIGNED:

Benjamin, James L.	*Correctional Officer*		*CETA*		
Holt, Annie	*Correctional Counselor I*		*Wetumpka Work Release*		
Hopper, Donald R.	*Correctional Officer*		*CETA*		
Barlow, Vernon	*Correctional Counselor I*		*Fountain*		
Davis, Larry V.	*Correctional Counselor Trainee*			*Fountain*	
Hall, Willie F.	*Correctional Officer*		*Fountain*		
Hammack, Julian O.	*Correctional Counselor Trainee*			*Fountain*	
Knight, Harvey	*Correctional Counselor Trainee*			*Fountain*	
Leatherwood, Douglas	*Correctional Counselor I*		*Fountain*		
Owens, Walter T.	*Correctional Officer*		*Fountain*		
Edwards, Floyd	*Correctional Counselor Trainee*			*Draper*	
Harville, Norman	*Correctional Officer*		*Holman*		
Whatley, William P.	*Correctional Officer*		*Holman*		
Easterling, Oscar	*Correctional Officer*		*CETA*		
Garrett, R. E.	*Correctional Officer*		*CETA*		

Caption Omitted

O R D E R

The Alabama Board of Corrections and certain other parties who have appealed to the Supreme Court of the United States have filed in this Court an application for stay pending appeal and a motion for hearing thereon. Said motion is DENIED and the application for stay pending appeal is also DENIED.

This order is entered by a majority of the members of the Court, Judge Johnson being absent from this jurisdiction.

Done this the 28th day of July, 1976.

Richard T. Rives
UNITED STATES CIRCUIT JUDGE
R. H. VARNER
UNITED STATES DISTRICT JUDGE

Caption Omitted

DEFENDANTS' MOTION FOR JUDICIAL NOTICE

Defendants move this Court in its consideration of this case to take judicial notice of the following:

1. U. S. Department of H.E.W., Public Health Services, National Center for Health Statistics, *Weight, Height, and Selected Body Dimensions of Adults*, United States 1960-62, Series II, Number 8, June 1965, Tables 1 and 2. (Attached as Exhibit A)

Respectfully submitted,
DAVID G. FLACK
ATTORNEY FOR DEFENDANTS

*Certificate of Service Omitted

NATIONAL CENTER
For HEALTH STATISTICS

Series II
Number B

VITAL and HEALTH STATISTICS
DATA FROM THE NATIONAL HEALTH SURVEY

Weight, Height, and Selected Body Dimensions of Adults
United States — 1960 - 1962

Age and sex distributions for weight, height, erect sitting height, normal sitting height, knee height, popliteal height, elbow rest height, thigh clearance height, buttock-knee length, buttock-popliteal length, elbow-to-elbow breadth, and seat breadth.

Washington, D.C. June 1965

U.S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
Anthony J. Celebreeze
Secretary
Public Health Service
Luther L. Terry
Surgeon General

Table 1. Weight in pounds, average weight and selected percentiles, by age and sex: United States, 1960-62

Average weight and percentile	Total, 18-79 years	18-24 years	25-34 years	35-44 years	45-54 years	55-64 years	65-74 years	75-79 years
	Weight in pounds[1]							
MEN								
Average weight--	168	160	171	172	172	166	160	156
Percentile[2]								
99	241	231	248	244	241	230	225	212
95	217	214	223	219	219	213	207	198
90	205	193	208	207	209	203	198	191
80	190	180	195	193	194	190	183	178
70	181	171	185	184	185	180	172	169
60	173	164	177	177	178	172	166	159
50	166	157	169	171	171	165	161	154
40	159	151	162	164	163	158	153	151
30	152	145	154	158	156	151	146	137
20	144	140	146	151	149	143	138	132
10	134	131	136	141	139	131	126	120
5	126	124	129	134	131	123	117	107
1	112	115	114	121	116	112	99	99
WOMEN								
Average weight--	142	129	136	144	147	152	146	138
Percentile[2]								
99	236	218	239	238	240	244	214	203
95	199	170	191	204	205	211	196	193
90	182	157	173	184	190	195	183	178
80	164	145	152	165	171	176	169	162
70	152	137	143	153	158	165	160	153
60	144	131	136	144	149	154	151	147
50	137	126	130	137	143	146	145	137
40	131	122	125	131	137	140	138	127
30	125	117	120	125	130	134	132	118
20	118	111	114	119	122	129	125	113
10	111	104	107	113	113	120	114	105
5	104	99	102	109	106	112	106	99
1	93	91	92	100	95	95	92	74

[1] Weight, partially clothed (see section on "The Measurements").
[2] Measurement below which the indicated percent of persons in the given age group fall.

Table 2. Height in inches, average height and selected percentiles, by age and sex: United States, 1960-62

Average height and percentile	Total, 18-79 years	18-24 years	25-34 years	35-44 years	45-54 years	55-64 years	65-74 years	75-79 years
	Height in inches[1]							
MEN								
Average height--	68.2	68.7	69.1	68.5	68.2	67.4	66.9	65.9
Percentile[2]								
99--	74.6	74.8	76.0	74.1	74.0	73.5	72.0	72.6
95--	72.8	73.1	73.8	72.5	72.7	72.2	70.9	70.5
90--	71.8	72.4	72.7	71.7	71.7	71.0	70.2	69.5
80--	70.6	70.9	71.4	70.7	70.5	69.8	68.9	68.1
70--	69.7	70.1	70.5	70.0	69.5	68.8	68.3	67.0
60--	68.8	69.3	69.8	69.2	68.8	68.3	67.5	66.6
50--	68.3	68.6	69.0	68.6	68.3	67.6	66.8	66.2
40--	67.6	67.9	68.4	68.1	67.7	66.8	66.2	65.0
30--	66.8	67.1	67.7	67.3	66.9	66.0	65.5	64.2
20--	66.0	66.5	66.8	66.4	66.1	64.7	64.8	63.3
10--	64.5	65.4	65.5	65.2	64.8	63.7	64.1	62.0
5--	63.6	64.3	64.4	64.2	64.0	62.9	62.7	61.3
1--	61.7	62.6	62.6	62.3	62.3	61.2	60.8	57.7
WOMEN								
Average height--	63.0	63.8	63.7	63.5	62.9	62.4	61.5	61.1
Percentile[2]								
99--	68.8	69.3	69.0	69.0	68.7	68.7	67.0	68.2
95--	67.1	67.9	67.3	67.2	67.2	66.6	65.5	64.9
90--	66.4	66.8	66.6	66.6	66.1	65.6	64.7	64.5
80--	65.1	65.9	65.7	65.5	64.8	64.3	63.7	63.6
70--	64.4	65.0	64.9	64.7	64.1	63.6	62.8	62.8
60--	63.7	64.5	64.4	64.1	63.4	62.9	62.1	62.3
50--	62.9	63.9	63.7	63.4	62.8	62.3	61.6	61.8
40--	62.4	63.0	62.9	62.8	62.3	61.8	61.1	61.3
30--	61.8	62.3	62.4	62.2	61.7	61.3	60.2	60.1
20--	61.1	61.6	61.8	61.4	60.9	60.6	59.5	59.0
10--	59.8	60.7	60.6	60.4	59.8	59.4	58.3	57.3
5--	59.0	60.0	59.7	59.6	59.1	58.4	57.5	55.3
1--	57.1	58.4	58.1	57.6	57.3	56.0	55.8	46.8

[1]Height, without shoes.
[2]Measurement below which the indicated percent of persons in the given age group fall.

Supreme Court, U. S.
FILED
OCT 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-422

E. C. DOTHARD, et al.,

Appellants,

v.

BRENDA M. MIETH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

JOSEPH J. LEVIN, JR.
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ATTORNEYS FOR APPELLEES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

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E. C. DOTHARD, et al.,

Appellants,

v.

BRENDA M. MIETH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellee Dianne K. Rawlinson moves that the order of the district court be affirmed or, in the alternative, that the appeal be dismissed.

STATEMENT

This is a direct appeal from that portion of

a decision of a three-judge district court holding height and weight requirements for prison guards and the exclusion of women from certain guard positions[1/] violative of the statutory proscription against sex discrimination in employment contained in 42 U.S.C. § 2000e-2 (Title VII).[2/]

Since the court below correctly applied established Title VII principles, no substantial question is presented by this appeal.

1/ The challenged height and weight requirements were imposed by statute. The statute is set forth in Appendix C of the Jurisdictional Statement, pp. 52-54. The exclusionary assignment policy was contained in Administrative Regulation 204, which is reproduced in Appendix D of the Jurisdictional Statement, pp. 55-57.

2/ The court below considered sex discrimination claims involving the employment of both prison guards and state troopers. Dianne Rawlinson, who challenged height and weight requirements for prison guards and the failure to assign females to contact positions within all-male penitentiaries, had perfected the procedural steps necessary to state a claim under Title VII. Brenda Mieth's claim, which challenged height and weight requirements for state troopers and the exclusion of women from the trooper force, arose under 42 U.S.C. § 1983 and was therefore decided on equal protection grounds. Since the trooper defendants have not appealed, only the correctness of the Title VII ruling is before this Court.

THE FACTS OF THE CASE

Appellants' statement of the facts is substantially correct. Since it is incomplete as to several essentials, however, the following additional information is presented.[3/]

It is undisputed that appellee was rejected as a candidate for employment as a prison guard solely because she was five pounds under the statutory minimum of 120 pounds. (J.S. 5.) She possesses a valid Alabama driver's license and has no physical defects. Moreover, her "educational credentials . . . are impressive and ideally suited for a career in corrections." (Slip. Op., J.S. 27.)

While appellants point out that the statute provides for a possible waiver of the physical requirements, they neglect to add that the Board of Corrections has never requested a waiver, has no standard procedure to inform the applicant of his or her right to request a waiver and did not so

---

3/ Throughout this Motion, "J.S." refers to appellants' Jurisdictional Statement and "Slip. Op." to the Memorandum Opinion of the court below.

inform Ms. Rawlinson. (Slip. Op., J.S. 30.) Moreover, the administrative practice of Defendant Peace Officers Standards and Training Commission in acting upon waiver requests fails to comport with fundamental fairness. (Slip. Op., J.S. 42.)

The statistical evidence amply demonstrates that the challenged height and weight requirements have a disproportionate impact on women. The 5'2" height requirement operates to exclude 33.29 percent of the women in the United States between the ages of 18-79, while excluding only 1.28 percent of the males. The 120 pound weight minimum excludes 2.35 percent of the males and 22.29 percent of the females in this 18-79 age group. When the height and weight restrictions are combined, nearly 100 percent of the men meet both qualifications as opposed to only 58.87 percent of the women. (Slip. Op., J.S. 32.)

The only testimony offered by appellants in support of the height and weight minimums was that of Defendant Locke, Commissioner of the Board of Corrections. His sole contention concerning the job relatedness of these physical requirements was

that they were related to strength. (Slip. Op., J.S. 40.) Plaintiffs, on the other hand, submitted testimony from two expert witnesses, Mr. Raymond Nelson and Mr. Robert Sarver. Mr. Nelson, who has 20 years experience in the corrections field, is presently Warden at the Metropolitan Correctional Center in Chicago, where no height and weight minimums for prison guards are imposed. Mr. Sarver served as the Commissioner of the Arkansas Department of Corrections and the Department of Corrections for West Virginia. The latter also did not impose height and weight minimums. Both Mr. Nelson and Mr. Sarver testified that height and weight requirements have absolutely no relationship to the duties performed by a prison guard. (Slip. Op., J.S. 40-41.)

Administrative Regulation 204, struck down along with the height and weight requirements, allowed for selective appointment of male and female prison guard applicants, thereby implementing appellants' policy of not hiring women in contact positions in all-male penitentiaries. Although

the Jurisdictional Statement implies that Regulation 204 was promulgated pursuant to advice from Abner Sibal, General Counsel to the Equal Employment Opportunity Commission,[4] the record establishes that the letter reproduced by appellants was in error and was duly corrected by Mr. Sibal.[5]

Since women were not employed in contact positions, they comprised only 3.8% of the guard force at the four all-male penitentiaries, where 77.24 percent of the total force were employed. (Slip. Op., J.S. 32.) Women, however, made up 30 percent of the guard force in contact positions at the non-penitentiaries in the Alabama Prison System. (Slip. Op., J.S. 26-27.)

Appellants offered no expert testimony to sustain the exclusion of women from contact positions

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4/ *See* Appendix D of the Jurisdictional Statement, pp. 57-63, where an undated letter from Mr. Sibal to Defendant Locke is reproduced. It should be noted that although appellants refer to "advisory opinions" of the EEOC (J.S. 3), Mr. Sibal expressly states that "this is not an opinion letter. . . ." (J.S. 58.)

5/ Letter from Mr. Sibal to Pamela S. Horowitz reproduced, *infra*, pp. 1a-2a.

in the all-male penitentiaries other than the testimony of their own employees. The latter claimed that women would not be able to perform adequately and safely and that prisoners' right of privacy would be violated. Notably absent, however, was any objective, demonstrable evidence that women could not perform the duties associated with the job. Moreover, the record showed that the women guards employed in contact positions at the non-penitentiaries performed the identical duties of their male counterparts. (Slip Op., J.S. 44.) In addition, plaintiffs' experts testified that the presence of women in all-male prisons contributes to the normalization of the prison environment, which has an advantageous psychological effect upon the prisoners. (Slip. Op., J.S. 44.) Accordingly, a recent policy statement by the Federal Bureau of Prisons states:

> The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. The integration of staff of both sexes into all institutions will promote this development. 6/

ARGUMENT

A. The district court's application here of familiar Title VII principles does not warrant plenary review by this Court.

The Jurisdictional Statement avers that "a substantial federal question is involved because a three-judge district court has held to be unconstitutional a state statute and a state administrative regulation." (J.S. 9.) Even if a holding of unconstitutionality were before this Court, that fact alone would not warrant plenary review. If it did, this Court could be forced to review every constitutional ruling handed down by a three-judge district court, which would impose an intolerable burden upon this Court's docket.

In any event, as the very next sentence of the Jurisdictional Statement indicates,[7] the

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6/ Federal Prison System, Policy Statement No. 3713.7, dated January 7, 1976. (Slip Op., J.S. 45.)

7/ "Both the statute and regulation were stricken on the basis of findings of sex discrimination against women under Title 42 U.S.C., § 2000e-2." (J.S. 9.)

statutory provision and administrative regulation at issue here were not held to be unconstitutional. They were invalidated pursuant to Title VII's prohibition against sex discrimination. The questions presented in this case thus involve the application of familiar Title VII principles. As such, they do not warrant plenary review by this Court.

B. The court below correctly held that plaintiff had demonstrated a prima facie case of sex discrimination.

The evidence in this case establishes that the challenged height and weight requirements have a substantially disproportionate impact on female applicants. The statistics show that the 5'2", 120 pound requirement excludes 41.13 percent of the female population while excluding less than one percent of the male population. (Slip Op., J.S. 35.)

Prior decisions of this Court establish that, under Title VII, a prima facie case of discrimination is made out upon a showing that an employment requirement operates to exclude a dispropor-

tionately larger number of women than men.[8]

C. The court below correctly held that both the height and weight requirements and the facially discriminatory assignment policies are impermissible under Title VII.

Once a Title VII plaintiff has demonstrated a prima facie case of discrimination, the burden shifts to the employer to prove that the disqualifying employment practice has a "manifest relationship to the employment in question."[9] Even if the employer articulates a legitimate reason for its challenged practice sufficient to meet the prima facie case, the employee may prove that the challenged requirement is but a pretext for

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8/ *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). Defendants' reliance on Geduldig v. Aiello, 417 U.S. 484 (1974), and Smith v. Troyan, 420 F.2d 492 (6th Cir. 1975), is misplaced. Both of those cases involved the fourteenth amendment, not Title VII. The *Smith* court, noting that "absent in plaintiff's complaint, . . . were references to Title VII of the Civil Rights Act of 1964," observed, "[W]hat Title VII compels may differ from what the equal protection clause, in itself, compels." (At 493.) This observation was borne out by this Court's recent decision in Washington v. Davis, ____U.S.____, 48 L.Ed 2d 597 (June 7, 1976).

9/ Griggs v. Duke Power Co., *supra*, at 432.

discrimination by showing that other selection devices which do not have a discriminatory impact would serve the employer's interest in "efficient and trustworthy workmanship."[10]

As discussed, *supra*, the sole contention offered by defendants in support of their height and weight requirements was that they were related to strength. They failed to prove, however, that a person below the arbitrarily defined level of 5'2" and 120 pounds would invariably lack the necessary strength to perform the required tasks. (Slip Op., J.S. 40.) Plaintiffs submitted testimony from two expert witnesses that height and weight requirements have absolutely no relationship to the duties performed by a prison guard. (Slip Op., J.S. 40.) Moreover, as the district court noted, "If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure

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10/McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). *Accord*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

strength." (Slip Op., J.S. 41.)

The court below thus correctly stated the applicable rules regarding burden of proof, and on the record before it, correctly held that the height and weight requirements impermissibly discriminate against women in violation of Title VII.

In defense of Regulation 204, defendant prison administrators testified that women would be unable to perform adequately and safely in contact positions in all-male penitentiaries. Defendants failed, however, to offer any objective, demonstrable evidence that women could not perform the duties associated with the job.[11/] Indeed, plaintiffs

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11/ Title VII provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..." 42 U.S.C. § 2000e-2(e). Courts, however, have treated the bfoq doctrine as a narrow exception to the general rule that there must be equality of employment opportunities. Thus, labeling a job as "strenuous" and then relying on stereotyped characterizations of women will not meet the burden of demonstrating a bfoq. Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d (cont'd)

established that defendants employed women in contact positions at all-male institutions other than the penitentiaries and that these women performed the same duties as their male counterparts. (Slip Op., J.S. 44.) In addition, plaintiffs' experts testified that the presence of women in all-male prisons contributes to the normalization of the prison environment, which has a positive psychological effect upon the prisoners. (Slip Op., J.S. 44.)

Defendants also attempted to justify Regulation 204 by advancing the prisoners' right of privacy. Apart from the fact that this position was totally inconsistent with defendants' employment of women in contact positions in the non-penitentiaries, the court below found that the concern for inmate privacy could be alleviated by procedures short of denying women the job.[12/]

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228 (5th Cir. 1969). There must be some objective, demonstrable evidence that women cannot perform the duties of the job in question. *See* Weeks, *supra*, at 236.

12/ The court suggested that defendants could designate selective work responsibilities. This would mean, for example, that female guards would (cont'd)

Having analyzed Regulation 204 in accordance with appropriate Title VII standards, the court below correctly concluded that, insofar as it denies women the opportunity to work as guards in all-male penitentiaries, the Regulation violates Title VII.

CONCLUSION

For the reasons herein stated, the order of the district court should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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PAMELA S. HOROWITZ
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---

not conduct strip searches. Warden Nelson testified that this procedure is utilized successfully at his prison, and the evidence showed that only a small percentage of the guard force at the Alabama penitentiaries is involved in conducting systematic strip searches. (Slip Op., J.S. 45.)

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20506

Pamela S. Horowitz, Esquire
The Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36101

Dear Ms. Horowitz:

This is in reply to your letter dated February 18, 1976, in which you offer several observations regarding a December 18, 1975, letter sent by this office to Mr. J. C. Locke, Jr., Commissioner of the Board of Corrections of the State of Alabama. Please be advised that through an oversight a segment was inadvertently omitted from the following sentence:

> It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions.

This sentence was intended to have read:

> It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions and female correctional personnel at all-male correctional institutions.

It is also noted that the case of City of Philadelphia v. Pennsylvania Human Rights Commission should be cited at 5 EPD ¶8535 not ¶8538.

We thank you for bringing this matter to our

attention. A copy of this letter has been sent to Mr. Locke, so that he may make the appropriate correction to the December 18, 1975, letter.

Sincerely,

s/ Abner W. Sibal /wlr
Abner W. Sibal
General Counsel

cc: Mr. J. C. Locke, Jr.

Supreme Court, U. S.
FILED
JAN 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-422

E. C. DOTHARD, ET AL.,
APPELLANTS

VS.

BRENDA M. MIETH, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-422

E. C. DOTHARD, ET AL.,
APPELLANTS

VS.

BRENDA M. MIETH, ET. AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLANTS

OPINION BELOW

The opinion and order of the three-judge district court for the Middle District of Alabama in the case at bar appears as *Mieth v. Dothard*, 418 F. Supp. 1169 (M.Ala. 1976) (Jurisdictional Statement, Appendixes A and B) (R. 1262, 1285).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1253.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This appeal involves amendments nine, ten and fourteen of the United States Constitution; 42 U.S.C.,, §2000e, §2000e-2; Title 55, §373(109), Code of Alabama (1940) (Recomp. 1958); and Administrative Regulation 204 of the Alabama Board of Corrections. These provisions are reprinted in Appendix *infra*.

STATEMENT UNDER RULE 33(2)(b)

Since this proceeding draws into question the constitutionality of 42 U.S.C., §2000e, §2000e-2, as amended, Acts of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C., §2403 may be applicable.

No court of the United States as defined by 28 U.S.C., §451 has, pursuant to 28 U.S.C., §2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn in question.

QUESTIONS PRESENTED FOR REVIEW

I. Whether The Enacting Powers Of The Congress Uphold A standard Of Review of State Statutes In Cases Of Claimed Sex Discrimination Different From The Standard Under The Equal Protection Clause Of The Fourteenth Amendment.

II. Whether Traditional Equal Protection Analysis Upholds The Validity Of A Height/Weight Requirement For State Law Enforcement Officers.

III. Whether Traditional Equal Protection Analysis Upholds The Validity Of A State Administrative Regulation Requiring That The Guard Positions In Physical Contact With Prison Inmates Be Filled By Guards Of Like Sex To The Inmates.

VI. Whether A Prima Facie Case Of Sex Discrimination Under Title VII From a Height And Weight Requirement May Be Shown By Showing A Statistical Disparate Effect On The General Population Of Women.

V. Whether The Job Of Law Enforcement Per Se Justifies An Employment Criteria Based Upon Height And Weight.

VI. Whether An Administrative Regulation Which Prohibits Male And Female Guards Alike From Serving In Contact Positions With Inmates Of The Opposite Sex Is Prima Facie Discriminatory Under Title VII.

VII. Does The Job Of A Prison Guard In A Penitentiary Who Is In Daily Physical Contact With The Inmates Justify A Bona Fide Occupational Qualification Requiring Those Guards To Be The Same Sex As The Inmates?

STATEMENT OF THE CASE

INTRODUCTION

This case is before this Court on direct appeal from an order of a Three-Judge District Court which enjoined the enforcement of both a state statute and an administrative regulation. The statute in question is Title 55, §373(109), Code of Alabama, (1940) (Recomp. 1958), which established the minimum standards for law enforcement officers. Para-

graph (d) of that subsection prescribes minimum height and weight requirements which affect the job of correctional counselor. The provisions of paragraph (d) require that the applicant be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician as in good health and physically fit for the performance of his duties. The court below found these qualifications to be sexually discriminatory in violation of Title VII, Civil Rights Act, 1964, toward the class of individuals represented by appellee, Diane K. Rawlinson, and enjoined the further enforcement of these requirements.

In addition to the above-minimum requirements, the Board of Corrections was further enjoined from enforcement of the Board's Administrative Regulation Number 204. That Regulation, being based on the advice of counsel for the Federal Equal Employment Opportunity Commission, provides for the determination and designation of bona fide occupational qualifications regarding sex in the field of correctional officers. The Regulation was declared invalid under both Title VII and the Equal Protection Clause of the United States Constitution. The case originally encompassed another class action challenging the policies of the Department of Public Safety as sexually discriminatory under the fourteenth amendment. The plaintiff also prevailed in that action, however, the party defendant to that action chose not to appeal. We will therefore direct the Court's attention only to the facts pertaining to the challenge by Ms. Rawlinson.

The appellant would submit that the subjective judgments involved below make the facts of this case especially important. They will therefore be stated with a greater degree of specificity than would generally be the case. Furthermore, the testimony was taken by deposition and covered a period of six to eight weeks. To minimize confusion we will therefore state the facts in the sequence in which the depositions were taken.

TESTIMONY TAKEN

The deposition of plaintiff's expert witness, Mr. C. Robert Sarver, was taken on February 16, 1976. Mr. Sarver testified that he had had experience in the corrections field, as Director of Corrections in West Virginia and Arkansas. Based on this experience he contended that minimum height and weight requirements for prison guards bore no relation to work performance. Additionally, he stated that women could perform equally as well as men in those positions even at an all-male institution.

However, on cross-examination, and to some degree on direct examination, Mr. Sarver freely admitted that he had never supervised women guards. He further admitted that neither Arkansas or West Virginia used women in those positions. His proposed reason for this was that he did not have any female applicants who were interested in employment in those positions. Furthermore, Mr. Sarver admitted that he had never made any study on a woman's ability to function as a prison guard. (A. 87). He did testify, however, that women other than guards had been in the institutions under his control, and that the male guards were always nervous under these conditions. (A. 86). His testimony disclosed that he had observed women guards in an all-male institution only at a county jail in Jacksonville, Florida. (A. 87). He said that the facility was a lock-up type, and much different from the dormitory-style facilities in Alabama. Sarver then testified that the dormitory-style in-

stitution was much more difficult to control. (A. 94). He indicated that his opinions were based partly on visiting many different prisons on behalf of inmates for whom he had testified. (A. 77).

On March 3, 1976, the plaintiff, deposed the defendant Judson C. Locke, Commissioner of the Alabama Department of Corrections. Locke testified that he entered the employment of the Department of Corrections in 1957 and became Commissioner in October, 1975. Mr. Locke testified that a correctional counselor, as that term is used in Alabama, performs the work of a prison guard. The function of his job is primarily to provide security in the institution. (A. 100). Due to the shortage of man power, a corrections counselor is expected to work in any position where he is assigned, and must be capable of performing strip searches, shakedowns and physically subduing inmates. (A. 101-102).

During the examination, Commissioner Locke was asked to state the reasons why he thought women should not be placed in contact positions in all-male institutions as is prohibited by the challenged Board Regulation. He testified that the correctional counselor should be capable of physically subduing an inmate, or protecting herself against an inmate; that her physical presence would incite inmates confined in an all-male environment with no hetrosexual outlets; (A. 111), and that from his experience in supervising women at male institutions he has found that the inmates show disrespect for female personnel thereby presenting a control problem. (A. 112, 131, 147).

In defense of these allegations, Commissioner Locke testified that the need always exists in the maximum security institutions, to have the capability to subdue an inmate (A. 113). He pointed out that forty (40) assaults have been

made on correctional personnel in the past three (3) years and that two such assaults resulted in the deaths of prison guards (A. 119). Even the simple assaults were noted to have caused the infliction of wounds. (A. 120). Furthermore, the Commissioner noted that Alabama operates dormitory-type institutions, and that placing women in contact positions would require that they inspect latrines, conduct strip searches, and view living and bathing areas. He contended that these activities would invade an inmate's right to privacy. (A. 132-133). Moreover, he submits that twenty (20%) percent of the inmate population are sex offenders, who are scattered throughout the system. (A. 149). As further justification for his opinion Locke stated that an inmate assaulted a female member of the prison staff, with intent to ravish, approximately one week prior to his deposition. (A. 142). In addition to that incident, a female student was taken hostage during a college tour of the Draper unit in 1972. (A. 143). Based on these and other experiences, Commissioner Locke stated that if females were placed in these positions as guards it would cause an increased burden on the male officers to provide security for female counselors. (A. 150).

Regarding the minimum height and weight requirement in the Alabama statute, Commissioner Locke testified that even though the minimum requirement for height and weight was five feet two inches tall, and one hundred twenty pounds, he would prefer a larger person if available. (A. 139). Furthermore, he testified that he was not aware of any system that had no minimum height and weight requirements. (A. 140).

The plaintiff also deposed James Jackson on March 3, 1976. Mr. Jackson testified that he was the Director of the Alabama Law Enforcement Standards and Training Com-

mission. In this position he administers the minimum standards provided for under Alabama law, and reviews request for waivers of the minimum standards. He recalled that he had granted four or five such waivers including a minimum weight waiver to one female. (A. 163). To his recollection however, a person under 5'2" tall had never applied for the waiver (A. 172). Jackson explained that the procedures for a waiver request were initiated by a written request from either the hiring agency or the individual involved. (A. 165). Once he receives the request, he reviews it and grants the waiver if the person's height and weight are reasonably proportional. (A. 166). He stated that he determines this proportionality in the same fashion a doctor does with a chart. (A. 166). He readily admitted that no formal forms or procedures are involved in this administrative review. (A. 165).

The next witness deposed was Ms. Dianne K. Rawlinson, who testified that she was a college graduate who majored in correctional psychology. She further testified that she did research work for various professors and worked part time with the Tuscaloosa City Police Department. Ms. Rawlinson stated that she had no physical defects, was 5'3" tall and weighed 115 pounds. Prior to her graduation, she applied for employment with the Alabama Department of Corrections but her application was rejected because she failed to meet the minimum weight requirement of 120 pounds. (A. 173). Ms. Rawlinson stated that she did not apply for waiver of the requirements (A. 176). She later instituted this action and shortly thereafter received her "right to sue" letter.

Mr. William Nelson was deposed by the plaintiff on March 19, 1976. He testified that he was the Warden of the Metropolitan Correctional Center, Chicago, Illinois and had had twenty years experience in corrections. Mr. Nelson

said that the Metropolitan Correctional Center, which he presently directed, housed approximately 275 inmates with the major portion of them being pre-trial inmates awaiting transfer. (A. 179, 180). A further description of the center indicated that each prisoner had a separate cell. (A. 201). Also, the toilet facilities were only partially visible from the living area and the showers were completely private with no outside observance. (A. 215, 216). The facility is not a penitentiary. Nelson further testified that the system there employed women correctional officers with no minimum height or weight requirements. The only physical requirements are that height and weight be proportional. (A. 182). He stated that the duties performed by both male and female officers were similar but that female officers were not allowed to perform strip searches on a man. (A. 184).

On cross-examination, Mr. Nelson testified that he has had only six months experience with women correctional officers in a male institution. (A. 193). He stated that the results he perceived were generally favorable. However, when defense counsel described the conditions that prevailed in the Alabama prison system, Mr. Nelson stated that he would have serious reservations about placing women in contact positions in that type situation. (A. 196). Furthermore, he testified that the Metropolitan Correctional Center is composed of lock-up rooms, even for the minimum security areas, (A. 201), and that sex offenders constituted less than two percent of the inmate population. (A. 203). He said that it would be an inappropriate place for a female if ten percent of the prison population were sex offenders, and not isolated. (A. 204).

When asked about the advantage of physical strength for correctional officers, Mr. Nelson noted that in his institution, strength would not be that important. (A. 210).

He did agree however that there came a point where a person is simply too small to be effective. (A. 211). Furthermore, he admitted that if all qualifications were equal among two prospective guards, he would choose the larger person. (A. 212). His testimony also disclosed that even though female guards were used at minimum security male prisons the policy of the Federal Bureau of Prisons did not include the hiring of females in penitentiaries because of the difference in structural design of the facilities and types of inmates housed there. (A. 214-215). Moreover, Mr. Nelson testified that he would find it difficult for women officers to work in an open-type dormitory penitentiary. (A. 216).

On March 31, 1976, the defendants deposed Mr. Tony Sewell. He testified that he was the director of the Mobile work release center which is part of the Alabama prison system (A. 247). He stated that the men there are minimum security prisoners and supposedly the best inmates in the Alabama penal system. The actual facility was described as resembling a dormitory housing establishment, which accommodates forty-six (46) inmates. (A. 249). The bathing and toilet facilities at the center are not open to view.

Seven correctional officers are assigned to the work-release center, two of which are female. (A. 250-251). Their duties involve head count, social and personal counseling, job placement, group and individual counseling, and, quite frequently, shakedowns. (A. 250). Female counselors are not allowed, for reasons of inmate privacy, to go into the rest-room area while in use. This situation has caused head counts to be made in certain instances by voice identification (A. 253). This has caused some problems due to inmate manipulation of this system. Sewell stated however, that no problem of assaults on the female counselors had occurred. He emphasized in this regard that the inmates had available

sexual outlets through a weekly furlough. He did note in passing, however, that rumors of misconduct between female correctional officers and male inmates were prevalent. (A. 256-257, 272). Other problems noted in the use of female counselors at the center include the fact that the females are not allowed to participate in physical searching the male inmates. (A. 262). This requires that a male officer's time always has to be arranged so that he can aid a female officer on duty. This has caused an overload on the male officers. (A. 264).

The next witness deposed was Mr. Bill Gilmore who is the Director of Frank Lee Youth Center within the Alabama Correctional System. (A. 282). His previous correctional experience includes service as a warden of a maximum security institution. (A. 283). In describing his present assignment, Gilmore stated that Frank Lee Youth Center is a minimum security institution for male youths whose ages must be under twenty-three years. The youths housed there cannot be violent criminals. (A. 286). In short, it is a school camp for young inmates. (A. 287), with an open-type dormitory structure.

Gilmore testified that the Youth Center employes several female correctional counselors whose duties are similar to the male personnel. These duties include patrolling the dormitories, making head counts throughout the day and night, and conducting periodic shakedowns. (A. 289). Mr. Gilmore testified that he had observed these women for two and one-half years and has found that their performance as a whole is not as effective as the male officers. (A. 290). He expressed concern about their surveillance techniques, and the unwillingness of the inmates to carry out their instructions. (A. 291).

His experience indicated that the instructions given by male officers are obeyed promptly, but those given by female officers are not obeyed without some degree of harsh action. (A. 291). Additionally, women will not conduct complete surviellance of the bathrooms and more private areas, due to their personal embarrassment, even though this is of extreme importance in the attempt to quash homosexuality and drug use. (A. 303). Moreover, these problems with use of female counselors have caused the male officers to complain that they have a double workload. (A. 305). Other problems have also been manifested by sexual gestures toward female counselors.

Despite the criticism of females, Mr. Gilmore testified that female correctional counselors could be used effectively at the youth center if on a smaller percentage to the entire counselor force. (A. 297).

Defense counsel further questioned the witness on his prior experience as warden of Kilby Correctional Center, a maximum security institution. Gilmore stated that in his opinion a woman correctional counselor would, herself, be in physical danger in a contact job within such an institution. He was obviously opposed to any contention that a female counselor would be effective in such an environment.

OTHER EVIDENCE

Due to the fact that the proceeding below was conducted entirely by deposition, items of evidence other than testimony were submitted to the court either as exhibits to those depositions or in a written "Offer of Evidence". Additionally, both sides by motions, requested the court below to take judicial knowledge of various factors. Items offered in such fashion which are of particular interest here include a statistical survey showing a sexual breakdown within the workforce in Alabama. Other census figures were offered as well, showing height and weight disparities between male and females in Alabama.

SUMMARY OF ARGUMENT

Congress received its power for the enactment of Title VII primarily from the commerce clause. In 1972, the act was amended to include all state activities with this coverage not being limited solely to activities affecting interstate commerce. Therefore, the power for such an amendment could only be derived from the enabling clause of the fourteenth amendment. Furthermore, since that amendment proscribes inequality of protection, the preferential protection of the five special classes under Title VII cannot be justified by any power granted by virtue of that amendment. Title VII's blanket application to all state activities is therefore an unconstitutional extension of congressional authority and void in that respect. Such an extension is not justifiable on the basis of "affirmative action equality" since the act gives no preference to a particular race, sex, color, origin, or religion, but merely proscribes the use of those criteria in an employment decision regardless of the effect.

Title VII also poses impermissible restrictions on ninth and tenth amendment rights. The onerous burden placed upon private employers by the present application of Title VII is unjustified. The intrusion into private profit related decisions in nearly every employment decision severely restricts contractual rights and requires the employer to affirmatively defend nearly every employment decision upon the most frivolous of challenges.

Furthermore, even if Title VII has valid application to the states, its present mode of application restricts tenth

amendment rights. A state defendant is treated the same as an individual defendant under Title VII. A state should have no greater burden to justify its statutes than by showing a reasonable relationship to a permissible state objective. Title VII should not destroy a statute's presumption of validity, nor should a state be called into question only upon the showing of a disparate statistical effect from a given statute.

The appellants contend Title VII and the fourteenth amendment should not require two separate standards for reviewing a state statute. The proper standard in any case is that traditionally applied under the fourteenth amendment from whence came Title VII's power of application to the states. Judged under this standard, the Alabama statute is clearly valid. The neutral statute and the proof adduced below show no contest of the legislature's lawful intent. However, even if shown to be prima facie discriminatory under the traditional fourteenth amendment requirements, the physical nature of a law enforcement job and its necessary service show a reasonable relationship with an employment requirement for minimum height and weight.

The challenged regulation should likewise be measured by the traditional equal protection analysis. It is facially neutral in prohibiting *either* sex from contact positions in a penitentiary for the opposite sex. The regulation at most causes only a disproportionate effect on women guards due to fewer female prisoners presently in the system. Such a fact shows no pretext for invidious discrimination. However, even assuming that this effect was sufficient to show the regulation to be prima facie discriminatory, ample justification is found in the Board's legitimate concerns for its promulgation and validity.

The appellants further contend that the above arguments notwithstanding, the challenged Alabama statute is valid even under normal Title VII standards. The proof of plaintiffs below showed only a statistical disparity between males and females on a statewide basis from the minimum height and weight requirements. No proof of either past-overt discrimination was presented, nor was any inference of discriminatory intent produced. Therefore, discrimination itself was not established. This failing prevented a prima facie case from being established. Furthermore, a plaintiff under Title VII when challenging a state statute should have an increased burden due to the presumed validity of a statute as well as the public availability of any information necessary for a challenge. In addition to these facts, the Alabama height and weight minimums, although not scientifically validated, are supported by the unique and unpredictably varied duties of a law enforcement officer. To insure that these standards were closely tied to job relatedness, the statute provides for waiver of these requirements in cases where they would exclude an otherwise capable employee.

Regulation 204, like the Alabama statute, is also fully supportable on Title VII grounds. Due to its facial neutrality, it is not explicitedly discriminatory. It admittedly has some disproportionate effect; however, this is not sufficient to bring the regulation into question. Although the court below assumed the regulation to be prima facie discriminatory, no past history of sexual discrimination was attributed to the Board nor were they found to have intended any gender-based effects. Therefore the plaintiffs challenge to the regulation was insufficient to shift the burden to the defendant for its justification. As in the case of the challenged statute, the plaintiff's case should have a greater minimum showing requirement due to the regulation's state origin.

Nevertheless, even ignoring the failings of plaintiff's challenge, the regulation should still stand. The factual consideration before the Board of Corrections in attempting to administer the needs of its inmates, the state populus and its employers show adequate justifications for the minimal infringement upon plaintiff's sexual freedom wrought by Regulation 204.

Appellants therefore urge that the opinion below be reversed, and that the validity of both the challenged Alabama statute and administrative regulation be upheld.

ARGUMENT

I. THE INCLUSION OF ALL STATE ACTIVITIES WITHIN THE COVERAGE OF TITLE VII IS AN UNCONSTITUTIONAL EXTENSION OF CONGRESSIONAL AUTHORITY.

A. Congressional Authority For The Enactment of Title VII Arises From Article I, Section 8, Clause 3 (The Commerce Clause) and Section 5 of the Fourteenth Amendment.

The appellants contend that the inclusion of all state activities within the coverage of Title VII is an unconstitutional extension of power of the congress. In its original form, Title VII had no direct application to states. Its original provisions specifically excluded a state from the definition of employer. In similar fashion, the term "industry affecting commerce" did not include governmental activities. *See* Pub L. 92-261, 1972 U.S. Code Cong. and Adm. News 2137. However, in 1972, the act was amended. Pub. L. 92-261, 86 Stat. 103 (Mar. 24, 1972). The 1972 amendment removed the specific exclusion of states from the term "employer"

as well as redefining the term "industry affecting commerce" to include "*any* governmental industry, business or activity." (Emphasis added). Section 701 (h), 42 U.S.C., §2000e(h). The appellants in the case at bar contend that such amendments were beyond the authority granted to congress under any provisions of the United States Constitution.

Under the commerce clause the congress has plenary power to regulate the various aspects of interstate commerce. *Maryland v. Wirtz*, 392 U.S. 193 (1968); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Darby*, 312 U.S. 100 (1941); *Gibons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). By virtue of this power, congress can prohibit by statute various forms of discrimination in private employment which it deems will adversely affect the flow of interstate commerce. *Katzenbach v. McClung*, 379 U.S. 294 (1964). No doubt this authority supports many of the provisions of Title VII. Equally well settled is the fact that a state as an entity may be regulated under this clause by valid federal legislation. *See Maryland v. Wirtz*, 392 U.S. 193 (1968). However, the breadth of a regulation of "any [state] industry, business or activity" extends beyond the authority granted under the commerce clause. No doubt many state activities do affect interstate commerce and therefore may be congressionally regulated under this clause, but this authority extends *only* to these activities. The 1972 inclusion of any governmental activities in Title VII's coverage goes beyond the regulation of commerce by encompassing all government activities whether or not they may affect commerce. From the very wording of the statute, governmental activities are included regardless of their affect on commerce:

> "(h) The term 'industry affecting commerce' means any activity, business, or industry in commerce or in

which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry' affecting commerce 'within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity*'." (Emphasis added) 42 U.S.C. §2000e(h)

This expanded coverage under the 1972 amendments may not therefore be supported by the commerce clause powers.

While congressional regulation of private employers needs the support of the commerce clause, congress is granted other independent power for regulation of states by virtue of the fourteenth amendment. *See United States v. City of Milwaukee* 395 F. Supp. 725 (E. Wis. 1975). Under section five of the fourteenth amendment, congress is given specific authority for the enforcement of that amendment by "appropriate legislation."

A study of the congressional history of the 1972 amendments indicates that it was the fourteenth amendments enabling powers upon which congress intended to base its expansion of Title VII and not the commerce clause. The chairman of the Senate Committee on Labor and Public Welfare, Senator Harrison A. Williams, Jr., praising the motive of the 1972 amendments stated:

> "Through use of the enabling clause of the 14th Amendment, the promise of equal protection can become a reality. The last sentence of the 14th Amendment enables Congress to enforce the amendment's guarantees by appropriate legislation.
>
> The inclusion of state and local government employees within the jurisdiction of Title VII protections will fulfill the congressional duty to enact the 'appropriate legislation: to insure that all citizens are treated equally in this country'." 118 Cong. Rec., §789.

This statement tends to support the proposition that the only congressional authority for including a state under Title VII is derived from the fourteenth amendment.

B. The Mandate Of Equal Protection To The States Under The Fourteenth Amendment Is Not Met By Federal Legislation Which, Although Valid Under The Commerce Powers, Establishes Special Protection For Established Classes In Areas Not Affecting Commerce.

The enabling powers of the congress to enforce the provisions of the fourteenth amendment extend only to the limits of that amendment. Of particular importance here is the equal protection clause of that amendment. It is axiomatic that "appropriate" legislation for enforcement of equal protection must in fact provide equal protection. Title VII when judged by this simple principle falls considerably short. The standard applicable to state action under the equal protection clause is distinct from the power of congress to establish different standards for conduct affecting interstate commerce.

As is evident from the considerable congressional debate and discussion of the act during its passage, the laudable goal of Title VII was unquestionably that of "equal" employment. The means to achieve this goal was to grant special protection to those persons discriminated against on the basis of race, color, religion, sex, or national origin. These categories were given special protection due to past discrimination in those areas. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430(1971). It was intended that by giving priority

under the act to these areas of discrimination, any remaining vestiges of past discrimination in employment could thereby be removed. *See Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974); *Bowe v. Colgate Palmolive Co.*, 489 F. 2d 876 (7th Cir., 1973). No doubt there is ample moral justification for this goal. And, if such designated areas of discrimination were involved in interstate commerce a legal basis for their special treatment can be found in the commerce clause. However, to attempt such special treatment in areas other than interstate commerce under the auspices of enforcing equal protection poses an anomaly of the most blatant nature.

Equal protection from unlawful discrimination is not achieved by preferential treatment to claims in certain areas only. Furthermore, legislation which mandates such treatment is certainly not "appropriate" legislation to enforce equal protection.

Title VII gives substantial preferential protection to claimants alleging discrimination in one of the five protected areas. Such claimants have available to them the entire enforcement machinery of the Equal Employment Opportunity Commission. Furthermore, their burden to show a prima facie case has been substantially lessened from that of discriminatory claims not arising under Title VII. *Griggs v. Duke Power Co., supra.* In addition to these factors, a state defendant under a Title VII claim has a substantially higher burden to overcome once a prima facie case has been established than would be the case if the claim had not been given special treatment under the act. For example, a state defendant in a Title VII action must show, once the burden of proof has shifted, a business necessity or bona fide occupational qualification for his employment practice. *Weeks*

v. Southern Bell Telephone & Telegraph Co., 408 F. 2d 228 (5th Cir., 1969). The paucity of successful defenses once a prima facie case has been shown under Title VII, indicates the severity of this burden. This is a substantial benefit to Title VII claimants. If a discriminatory claim is asserted against a state defendant on grounds not covered by Title VII, the plaintiff must affirmative show intentional discrimination on the part of the defendant. If this can be shown, traditional equal protection analysis requires the state defendant to generally show only a reasonable relationship between the challenged policy and a legitimate public purpose. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Obviously, claimants asserting discrimination in areas not covered by Title VII have significantly less protection than Title VII plaintiffs. Such disparity of treatment cannot be tolerated under the equal protection clause. Equal opportunity for employment prohibits *all* forms of state sponsored discrimination on an equal basis. Likewise, an act furthering this goal can provide redress for such discrimination only on an equal basis for all claimants—regardless of the grounds for their discrimination. Therefore, the congressional limitation of Title VII to discrimination on the basis of race, color, religion, sex and national origin, is, in itself, an abridgement of the equal protection rights of plaintiffs who maintain discriminatory claims on other bases and who are not provided protection under Title VII. It cannot therefore be maintained that Title VII's extension to state employers is an enforcement provision of the fourteenth amendment.

C. Title VII's Prohibitions On The Use Of Certain Criteria For Employment Find No Justification In Affirmative Action Theories Which Attempt To Equalize The Opportunities For A Specific Race Or Sex.

The appellants recognize that forms of racial preference have been allowed in the past and even mandated in some instances. *See e.g. Swann v. Charlotte - Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968); *Offermann v. Nitkowski*, 248 F. Supp. 129 (W.D.N.Y., 1965) *aff'd* 378 F. 2d 22 (2d Cir., 1967). In these cases, as well as in *Green v. County School Board*, 391 U.S. 430(1968), which first mandated affirmative action, racial consciousness was used in an attempt to negate the effects of social and cultural deprivation of minorities. In similar fashion, Title VII attempts to equalize employment opportunities by removing past stigmas of discrimination in certain areas. It might therefore be argued that the preferential protection under Ttile VII, like affirmative action plans, promote, rather than deny equal protection. Of singular importance in assessing such an argument is the origin from which the preferential treatment came.

When a court in a case such as *Green, supra,* orders affirmative action or some form of color consciousness it does so, in light of specific facts before it. From these facts, the court can determine whether or not the plaintiffs actually suffer from past social deprivation and to what degree, thereby allowing the court to fashion relief to promote truly equal opportunity. However, when congress in Title VII undertook to give special protection in certain cases of discrimination, the parameters of its affect were not defined by a single set of facts. The preferential protection offered by the statute finds little or no justification in prior inequities due to the statutes breadth. Very likely a plaintiff under Title VII could be a white, male protestant with no history of cultural deprivation but who was denied employment on the basis of one of the forbidden criteria — race, color, religion, sex,

or national origin. Such blanket coverage through the inflexibility of a statute bears little analogy to a judicial decision fashioning relief for a plaintiff of a given sex or race whose race or sex is shown to be socially deprived. In short, Title VII prohibits the discriminatory use of certain criteria for employment regardless of the choice made from such use, whereas affirmative action plans seek to equalize the opportunities for persons of a specific sex or race. It is therefore the contention of the appellants that Title VII's application to the states is an unconstitutional exercise of congressional power finding no justification in the affirmative action theories of equal protection analysis.

II. TITLE VII PERPETRATES AN IMPERMISSABLE INFRINGEMENT OF INDIVIDUAL RIGHTS UNDER THE NINTH AMENDMENT, AS WELL AS INFRINGING UPON STATE'S RIGHTS UNDER THE TENTH AMENDMENT.

A. The Ninth Amendment Is Violated by Title VII's Infringement Upon Fundamental Rights Of The People.

The appellants in the case at bar contend that in addition to Title VII's failings under the equal protection clause, it also denies fundamental individual rights under the ninth amendment. Appellants are state officials, yet the unconstitutional infringement on individual rights by Title VII has as great an impact upon them as it does any individual employer. They are certainly affected sufficiently to allow a sharpening of the issue as is required for their standing to assert this ground. *Flast v. Cohen*, 392 U.S. 83 (1968). The reasons proposed showing a ninth amendment violation, show equal impact on individual employers as well as state employers.

Under Title VII and its application, an employer is greatly restricted not only in his right to freely contract with new employees, but also in the freedom of his actions in the running of his business. Admittedly, such restraints pose to the courts a balancing problem between the rights of an individual and any incremental good to society. It is the contention of the appellants, that Title VII taxes the rights of the individual employer far too much for the actual benefit it produces.

In a society such as ours, which operates under a free economic system, it is of paramount importance that the individual rights of our employers be recognized and protected. No doubt some regulation of free interprise is necessary to prohibit societal exploitation. Obvious examples of such necessary regulations include the Taft-Hartley Act, the Child Labor Laws, Workman's Compensation Laws and even the Occupational Safety Act which established OSHA. All of these laws impose some restriction on employer's rights, yet they are all justified by the countervailing considerations of public welfare. Also common among all of these acts is the fact that they seek to check over-zealous profit seeking which harms the public. They do not however, call into question the position of the employer as being the best judge of business efficiency as does Title VII.

In effect, Title VII puts an employer in the position of having to defend nearly every employment policy he may establish before the critical eye of a plaintiff (applicant/-employee) and a federal commission or judge who, in most cases, possess only a minute comparative knowledge about the business in question. Very little attention has been given the fact that an employer's motive in the first instance is that of *profit*. It naturally follows that if his employment

policies were not sufficiently business related to allow the choice of competent employers then the business will fail. Social prejudice in a business realm which excluded available competent employees from consideration would be an expensive, if not disasterous flaw in any business. Nevertheless, Title VII by its terms and application assumes that all employment policies which have a disproportionate affect in any of the five areas under Title VII protection are the result of just such a motive. See NOTE, 72 Colum. L. Rev. 900 (1972).

The liberal application of this Act has encompassed virtually all employee related decisions, by an employer. For example, in the case at bar, a completely sex-blind statute was called into question by merely showing that more men than women in Alabama could meet its physical minimums. While the appellants contend that this was also a misapplication of the relevant law, such harassment of employers is common place under Title VII. *See e.g., Fowler v. Schwarzwalder*, 351 F. Supp. 721 (D. Minn., 1972); *Parham v. Southwestern Bell Telephone*, 433 F. 2d 421 (8th Cir., 1970); *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir., 1971); *Buckner v. Goodyear Tire and Rubber Company*, 339 F. Supp. 1108 (N. Ala. 1972).

Under Title VII's present interpretation nearly every employment test of nearly every employer regardless how neutrally phrased must be defended when challenged by only a statistical showing of a disproportionate impact. If a strength test or height/weight requirement is used by an employer seeking employees for some physically-related job, this will almost invariably have a disproportionate impact on women due to their inherently smaller structure. See NOTE, 47 So. Cal. L. Rev. 585 (1974). *Also see Officers For Jus-*

tice v. Civil Service Commission of San Francisco, 395 F. Supp. 378 (N. Cal., 1975); *Meadows v. Ford Motor Co.*, 62 F.R.D. 98 (W.Ky., 1973), *mod. on other grounds*, 510 F. 2d 939. Likewise, if an employer is engaged in a more intellectually oriented field and requires some form of written tests or minimum educational standards this will nearly always affect blacks in a disproportionate fashion due to their previous social deprivations. *See e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Therefore, in nearly all instances of employment testing the employer will be presumed to be discriminatory until he can prove otherwise.

An additional impediment to an individual's liberty in the operation of his business is the fact that when challenged, he is required to affirmatively show the relationship of his employment policies with the efficiency and safety of his business. Validation of these tests is a matter of requirement by the EEOC. 29 CFR, §1607, 35 F.Reg. 12333 (Aug. 1, 1970).

Regardless of the social desirability of prohibiting certain kinds of discrimination above other forms of discrimination, to subject the American employer to the unjustified harassment prevalent under Title VII is not warranted. The business employer should not be held accountable as a vessel of social change. It is completely unrealistic to assume that the tapestry of skills, abilities and talents in our country cut equal paths among all races, colors, religions, sexes and national origins. To hold an employer accountable for the disparities among these classes in particular fields is a serious contravention of his individual freedoms. Title VII's present interpretation by many courts place just such a burden on employers. Surely the ninth amendment rights reserved to the people, encompass the rights of an employer to pursue

profit by the reasoned choice of competent employees without the burden of having to justify every decision when they are questioned by little more than the bare allegations of a disappointed employee or applicant. Appellants ask this Court to so find and to strike down those areas of Title VII which might tend to support a contrary interpretation.

B. Assuming Arguendo That Title VII Has Valid Application To The States, Then Its Present Mode Of Application Is Violative Of The Tenth Amendment Police Powers.

As the appellants argued earlier, congress assumed its power to enact Title VII and its amendments from the commerce clause and the enabling clause of the fourteenth amendment. (See Argument I). We make no argument here that the legitimate use of Article I, §8, cl. 3 by the congress in Title VII contravenes the tenth amendment. We recognize that the tenth amendment and the commerce clause are mutually exclusive. *See United States v. Bally Mfg. Corp.*, 345 F. Supp. 410 (D.La., 1972). We do contend, however, that Title VII's application to the state's, which is justified only by the fourteenth amendment, is violative of the state's police power in addition to the doctrine of equal protection as was argued earlier (See Argument I (c)). The appellants do not challenge the act on the preemption doctrine, but rather on the basis that Title VII and its application upsets the balance between the preservation of fourteenth amendment rights and those of the states. In short, it is the position of appellants that Title VII has application to the states only by virtue of the fourteenth amendment; therefore, the previous caselaw balancing the equities between the fourteenth and tenth amendments should have application. *E.g. McGowan v. Maryland*, 366 U.S. 420 (1961); *Loving v. Virginia*, 388 U.S. 1 (1967), *McLaughlin v. Florida*, 379 U.S.

184 (1964). However, in Title VII litigation, the state defendant is treated with no more deference than an individual. No greater degree of proof is required by Title VII to show a state statute is discriminatory than with any other defendant; nor are a state-defendant's available defenses any less burdensome. Such indiscriminant treatment of states violates the tenth amendment, as well as the holdings of a multitude of cases of this Court decided under the fourteenth amendment. This Court stated the relationship of the fourteenth and tenth amendments succintly in *McGowan v. Maryland*, 366 U.S. 420 at 425-426 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (citations omitted).

It is this reasonable relationship standard which should be applied when a state statute is challenged under the purview of the fourteenth amendment. Appellants contend that Title VII's blanket application to the states by its own terms is violative of the fourteenth amendment (See Argument I(c)); however, even if it were held valid in that respect, a state statute is entitled to more respect than is given by the act's provisions and application. The substance of this

argument is that, if Title VII is valid in the source of its enactment power, any application to a state defendant will still require the traditional presumption of validity in relation to state statutes. Furthermore, the only burden such a defendant need overcome is to show a rational relationship to a permissible state objective. State application of Title VII derives from the fourteenth amendment and must therefore bow to previous limits of that amendment's restraint on states rights.

In the case at bar, the appellants were called upon to defend both a state statute and a regulation after the mere showing of a statistical disparate affect upon female and males in general from a height and weight requirement. Even though this statute was the result of the collective wisdom of the entire Alabama legislature, it was called into question with no more proof than that required to challenge the caprice in employment of an individual proprietor. No presumption of validity was indulged for the enactments, nor was the plaintiff required to shoulder the burden of proof normally required when challenging a statute. Furthermore, the state statute was judged on the basis of the "business necessity test", with the administrative regulation measured against a bona fide occupational qualification standard. No acknowledgement was made of the state legislature's province. No inquiry was made as to whether the state's provisions were reasonably related to a permissible state objective. The appellants contend that such derrogation of the state's rights is violative of the tenth amendment. Furthermore, appellants contend that even if this Court should find Title VII valid in its application to the states, a correct application of the reasonable relationship standard to the statute and regulation in question will uphold their validity.

III. TRADITIONAL EQUAL PROTECTION ANALYSIS UPHOLDS THE VALIDITY OF BOTH TITLE 55, § 373 (109), CODE OF ALABAMA (1940) (RECOMP. 1958) AND THE BOARD OF CORRECTIONS ADMINISTRATIVE REGULATION NUMBER 204.

In the first instance, the facts before the court below would not have justified a prima facie case for the plantiffs when judged on traditional equal protection standards. Even the opinion below recognized that the standard of proof for a challenge under the equal protection clause is higher for a plaintiff than under Title VII. See Jurisdictional Statement at 32). This Court's recent decision in *Washington v. Davis*, 96 S.Ct. 2040(1976), firmly establishes this fact by holding that invidious discrimination under the fourteenth amendment requires discriminatory intent and not merely a disproportionate impact. Of course, such an impact is relevant to the question of intent. However, in the case at bar, even assuming there was some disproportionate impact on men and women from the height/weight requirement of the state statute or from the administrative regulation, the other facts before the Court deny any intent on the part of the Alabama legislature or the Board of Corrections to invidiously discriminate against women.

A. Title 55, § 373(109), Code of Alabama (1940) (recomp. 1958) Establishes Classifications Reasonably Related To Permissible State Objectives.

The state enacted a statute setting minimum standards for law enforcement officers. Title 55, § 373(109), Code of Alabama (1940) (Recomp. 1958). No mention of sex was made in the statute; however, height and weight minimums were established. These minimums required a law enforcement officer, male or female, to be at least five feet two inches tall and to weigh at least one hundred twenty pounds. Included within the coverage of this act are prison guards hired by the defendant Alabama Board of Corrections.

Plaintiffs below produced statewide statistics encompassing females between the ages 18 and 79 and interpreted them to show that more women than men would be excluded from these jobs due to the smaller stature of women. In addition to these general facts, plaintiffs adduced little if any evidence which had bearing on the intent of the Alabama legislature in establishing the standards. The plaintiff offered testimony of two expert witnesses in an attempt to show that these minimums had no job related characteristics. As both witnesses, Mr. Nelson and Mr. Sarver, agreed however, a prison environment necessitates the frequent use of force by guards to subdue unruly inmates. Naturally, both witnesses noted that guards are a minority in a prison and could not be expected to overcome an entire prison population single handedly. In such an environment of unpredictable violence it was proposed that probably the most desirable characteristic for a guard would be a coolness of nerve. Nevertheless, the physical nature of the job prompted even Mr. Nelson to agree that if his employment decision for a guard was between two men of different sizes but with all other qualifications equal, he would choose the larger of the men (A. 212). Of additional import here is the fact that both Mr. Sarver and Mr. Nelson drew on experiences from supervising prisons disimilar to those in Alabama. (A. 195-96) Also, neither man had any indepth knowledge of the problems in the Alabama system, although Mr. Sarver had visited several of the Alabama institutions (A. 203-05). These facts hardly show that the height and weight minimum are "mere pretexts designed to effect an invidious discrimi...tion against the members of

one sex or the other." *Gedulid v. Aiello*, 417 U.S. 484, 496-497, n.20 (1974).

Furthermore, even if the state should be required to justify its statute, the facts in the record more than show a reasonable relationship between the height/weight minimums and a lawful state objective. In reviewing any state justification for the statute, the appellants contend that the Court should not be bound by the testimony of a single defendant. The court below apparently assumed that the entire burden of justifying the act was upon the shoulders of Commissioner Locke. (See Jurisdictional Statement at 40) Certainly the reasons he saw as justifying the statute are valid, however his voice should not be taken as that of the entire state legislature. Yet the court below apparently limited its considerations to only the reasons proposed by Locke. A state statute should not stand or fall upon the opinion of one man.

Unquestionably, the state has a valid interest in providing adequate law enforcement for its populus. By enacting minimum standards for law enforcement officers, the state was seeking to achieve that end. Considering the unique nature of law enforcement and the variety of functions which any given officer may have to perform on a moment's notice, it is not unrealistic for the legislature to presume that size, in and of itself, would in many instances be beneficial. This relationship to the job in general is admittedly not mathematically definable, but neither could the job required of law enforcement officers be precisely described to encompass every potential situation. Certainly, state legislators, familiar with the problems of law enforcement in their particular state, should not be held to so rigid a standard with such an essential service. The potentials of strength, leverage, pys-

chological advantage, and matters even more subjective, should be seen as adequate justification for the state act under attack and more properly weighed in a legislative forum. The court below even recognized that the height/weight minimums have some relationship to strength, albeit "crude". (See Jurisdictional Statement at 41).

The appellants here contend that this "crude" relationship, as well as other resultants of a minimum height and weight requirement, show an adequate and rational relationship to the provision of capable law enforcement officers. The widespread use of such minimums among law enforcement agencies also attest to their validity as reasonable requirements. A survey of various agencies indicates that the F.B.I. maintains a height minimum as do 47 of the nation's 50 largest urban police departments. *See*, Note, 47 So. Cal. L. Rev. 585, 586 (1974).

Appellants therefore urge that the court below erred in striking down the Alabama statute as it is rationally related to a legitimate state objective.

B. Administrative Regulation 204 Of The Alabama Board Of Corrections Is Rationally Related To A Permissible State Objective.

1. Regulation 204 should be measured by the rational relationship test.

Administrative Regulation 204, which was also striken down by the lower court's ruling, was promulgated by the Alabama Board of Corrections. The regulation was an attempt by the Board to identify certain jobs in both the male and female prison institutions where the use of guards of the opposite sex would be disadvantageous. The criteria

of the regulation and their application had equal application to both men and women guards, in that each sex was restricted in some jobs in prisons for the opposite sex. There are more male prisons in Alabama and this, of course, increases the actual number of available guard positions for males under Regulation 204. However, the regulation itself applies to both males and females equally. No distinction is made between treatment of females as opposed to that of males under Regulation 204. For that reason, appellants contend that the terms of the regulation show no gender-based discrimination. The Court therefore need not be concerned with any argument for the application of "strict scrutiny" to the regulation. *See Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). If the terms of the regulation levied special impediments on women then those arguments might be applicable, but as is evident from the regulation both men and women are limited in employment opportunities. The reasons proposed for strict scrutiny of a particular classification are usually based upon some prior social deprivation of that particular class. However, since Regulation 204 effects both men and women alike, social deprivation would not justify strict scrutiny of the entire statute because men are generally not considered socially deprived. Although the sex of the applicant guard, whether male or female, is a factor under Regulation 204, it is not the sole determinant of employment opportunities. This factor must be considered in conjunction with the sex of the prisoners to be guarded, as well as other factors before a job assignment is made. It is the combination of these factors which determines a job assignment for any guard, male or female. Regulation 204 certainly does not define opportunity in a discriminatory fashion toward women. Whatever the merits of the argument that this Court should now adopt the strict scrutiny test for sexual classifications

are therefore inapposite to Regulation 204.

2. The plaintiffs failed to show that Regulation 204 was a pretext for invidious discrimination.

Regulation 204 was carefully drafted by the Board of Corrections only after the solicited advice of counsel for the EEOC in order to assure protection of the rights of all parties involved. (See Jurisdictional Statement at 57-63). The Regulation itself is facially neutral by affecting both men and women with no distinction. As mentioned above, however, there are more male prisons than female in Alabama. Therefore, the application of the Regulation has a disproportionate impact on women because there are fewer contact positions for women than for men in the Alabama system. This fact without more does not show a prima facie case under the fourteenth amendment. *See Washington v. Davis*, 96 S.Ct. 2040 (1976). As the facts in the record indicate, women are used in the male prisons and men are used in the female prisons, but neither men nor women are used in contact positions with penitentiary prisoners of the opposite sex. This policy of the Board affects both men and women guards rather than just limiting women as the court below stated. (See Jurisdictional Statement at 25). Even though women guards have fewer contact positions available to them under the Regulation because of the smaller number of female prisoners, this fact hardly shows the Regulation to be invidiously discriminatory.

3. If the facts before the Court show a prima facie case against Regulation 204 under the fourteenth amendment, the action must fail as the Regulation is supported by a legitimate state interest.

Appellants admit that it is the policy of the Board of Corrections that guards of either sex should not be used in

contact positions within penitentiaries housing prisoners of the opposite sex. This policy is soundly supported by the experience of the prison authorities, and is justified by state objectives of maintaining safety, control, and security of the prisons, both within and without their walls. The appellants further contend that those state goals are compelling, should this Court choose to apply strict scrutiny, and that Regulation 204 is both necessary to those objectives, and the least offensive method of achieving them. *See Loving v. Virginia*, 388 U.S. 1, 10-11 (1967); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The facts before the Court support these contentions.

The testimony of Commissioner Judson Locke in the record gives the Court the most detailed insight into the problems and considerations of the Alabama penal system (A. 111-13). As Commissioner Locke stated, the penitentiaries in Alabama are dormitory-type institutions with communal toilets and showers. (A. 101). Furthermore, large scale farming operations are conducted at several of the institutions which require daily strip searches of large numbers of inmates. (A. 103-106). All of the penitentiaries are designed as maximum institutions. Additionally, approximately 20% of the inmate population is composed of sex offenders (A. 149). Violence is a daily occurrence in the Alabama system and requires physical combat between guard and inmate on a regular basis. (A. 121-23). Also noteworthy is the fact that guards in each institution are used interchangably in the various jobs and patrols. (A. 100-01). This is done due to manpower limitations, as well as to assure that all guards are acquainted with all aspects of the institution so as to provide for maximum flexibility in the event of control problems in any area of the prison. These facts all weigh heavily to justify the Board's decision not to interject an additional

disruptive factor of possible sexual attraction between guards and inmates into the prison system.

Further justification for the Board's reticence to use guards with inmates of the opposite sex in contact positions within penitentiaries, is found in the Board's experience with such arrangements in minimum security institutions. As Commissioner Locke testified, in some work release centers and at a youth facility some guards are used in contact positions with inmates of the opposite sex. (A. 109-10). Even though these centers house the "cream" of the inmate crop, are minimum security, provide a more normalized environment, and inherently require less infringement upon each inmate's rights of privacy, several difficulties have arisen. (A. 112). These problems have all had sexual connotations including: open flirting between guards and inmates, physical advances, loss of control attributable to perceived weaknesses of a female supervisor over male inmates, increased responsibility on other guards to quell any problems arising because of sexual attraction. (A. 305). While women are still used in these male institutions, the disruptive factors experienced in these tranquil waters suggest even greater problems would be encountered in a penitentiary setting. No doubt these same reasons were noted by the Federal prison administration in its choice not to use guards of the opposite sex in contact positions within penitentiaries until sufficient safeguards can be afforded (A. 214-15).

In light of these facts and the crucial nature of prison management, both to the surrounding community and the inmate population, the Board's regulation restricting contact guard positions to guards of like sex with that of the inmates is compelling and reasonable. In an atmosphere possessing no heterosexual outlets, a recognition of the excitement caused by the introduction in close contact of persons of the opposite

sex can hardly be seen as unreasonable. Regulation 204 seeks to avoid these problems by restricting *only* those contact positions. Appellants contend such a restriction is both reasonable and patently justified.

IV. ASSUMING ARGUENDO THAT TITLE VII IS CONSTITUTIONALLY VALID IN ITS APPLICATION TO THE STATES, TITLE 55, 373 (109), CODE OF ALABAMA (1940) (Recomp. 1958) IS VALID UNDER TITLE VII AS IT HAS NOT BEEN SHOWN TO BE PRIMA FACIE DISCRIMINATORY AND IT IS FURTHER SUPPORTED BY A VALID BUSINESS NECESSITY.

A. The Evidence Presented By The Plaintiffs Fails To Demonstrate Gender-Based Discrimination.

1. A statistical disparity is insufficient by itself to show invidious discrimination.

Assuming for argument sake that Title VII is properly applicable to the states, appellants contend that the evidence below failed to show a prima facie challenge to the Alabama statute. As this Court recently held in *General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031 (Dec. 7, 1976), there are some differences in discrimination challenges under Title VII as opposed to the fourteenth amendment, however, the case law under the fourteenth amendment is useful in a Title VII case as a starting point of interpretation. 45 U.S.L.W. at 4033. The Court pointed out a particular similarity between the two types of actions is that both require a finding of "discrimination". This term, as the Court noted, is not defined in Title VII and must therefore draw its definition from prior case law. Consequently, under either a Title VII claim or a fourteenth amendment claim, discrimination itself must be

shown. When a challenged action is based on gender per se as in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), this showing is simplified However, when a neutrally based classification is challenged, the plaintiff must show that the distinctions made are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496-497, n. 20 (1974). This finding of sex-based discrimination is necessary to "trigger" a finding of an unlawful employment practice under Title VII. *General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031, 4034 (Dec. 7, 1976).

As the Court noted in *Gilbert*, "a prima facie violation of Title VII can be established *in some circumstances* upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." (Emphasis added) 45 U.S.L.W. at 4034. *Also see, Washington v. Davis*, 96 S.Ct. 2040, 2051 (1976). This statement by the Court was followed by a reference to *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) wherein a prima facie case was established of invidious racial discrimination, even absent proof of intent, through the showing of disproportionate racial effect from employment tests. The appellants contend that it is especially crucial to note that the facts before the Court in Griggs unquestionably showed a past practice of overt racial discrimination in the company's employment policies. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) wherein a prima facie case was established of invidious racial discrimination, even absent proof of intent, through the showing of a disproportionate racial effect from employment tests. The appellants contend that it is especially crucial to note that the facts before the Court in *Griggs* unquestionably showed a past practice of overt racial discrimination in the company's employment poli-

cies. *Griggs v. Duke Power Co.*, 401 U.S. at 427-428. This fact, in conjunction with a racially disproportionate impact from present employment tests moved the Court to find that a prima facie case of invidious racial discrimination in violation of Title VII had been shown. Appellants content that these are the "circumstances" which this Court in *Gilbert* stated would show a prima facie case of discrimination in a neutral plan. The logic of this position is further supported by the legislative intent of Title VII to free certain classes of individuals from the "barriers that have operated in the past to favor an identifiable group" over other employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). *Also see, Bowe v. Colgate Palmolive Co.*, 487 F. 2d 896, 900 (7th Cir., 1973); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Garrett v. Mobile Oil Corp.*, 395 F. Supp. 117, 124 (W. Mo., 1975); *Officers For Justice v. Civil Service Commission of San Francisco*, 395 F. Supp. 387 (N.Cal. 1975).

From the holdings of the above-cited decisions, appellants deduce that a prima facie case of sexual discrimination under Title VII requires (1) a disproportionate effect on applicants of different sexes caused by the challenged classification, *and* (2) a past history of overt sexual discrimination by the defendant. Applying these factors to the case at bar, it is evident that the plaintiff failed to prove a prima facie case of sexual discrimination form the Alabama statute. A cursory examination of the opinion of the court below quickly reveals that its finding of a prima facie case under Title VII was based *solely* upon a statistical survey of the entire female population of Alabama. That survey purportedly shows a disproportionate impact on women from the height and weight minimums of 5'2" and 120 lbs. (See Jurisdictional Statement at 32, 35). Such a general statistical showing should not in and of itself shift the burden of proof to the defendants. The plaintiffs produced no evidence of any intent to discriminate, nor of any past history of sexual discrimination. While appellants recognize that "intent" to discriminate is not necessary under Title VII, it is our position that if no intent is shown, then plaintiff's must at least show some previous history of discrimination to that class by defendants before the burden should shift. Statewide statistics indicate very little standing alone. Certainly they do not approach a showing of invidious discrimination to actual applicants from a facially neutral statute. As this Court noted in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), an employer should only be burdened with defending his employment practices after discrimination has in fact been shown. The Court there stated:

> "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *See McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)." 422 U.S. at 425.

The statistics offered in the case at bar make no pretense of representing "applicants". The ages covered (18-79) far exceed the age of employable prison guards. Furthermore, as the court below notes, only a small percentage of the females surveyed are even in the work force. (See Jurisdictional Statement at 31-32).

If this Court should hold that a statewide statistical disparity is necessary, then nearly every employment criteria or test would be prima facie discriminatory to at least one of the protected Title VII classes. It would stretch the imagina-

tion to develop an employment test which would be job related as well as having exactly equal effect on all sexes, colors races, religious and national origins within a given state. Surely more than a mere census finding should be required to place an employer on the defense. If not, then employer harassment by unfounded claims is certainly imminent as well as the commensurate burden upon the federal judiciary to determine in each case the percentage difference which be "disproportionate." Appellants contend that such was not the intent behind Title VII. We therefore urge the Court to find that the statistical showing of the plaintiff's below was insufficient to establish a prima facie case of sexual discrimination under Title VII.

2. When a state statute is challenged by a Title VII plaintiff, a presumption of validity should be indulged for the statute.

The appellants have found no cases where this Court has reviewed a Title VII challenge to a state statute. As we argued earlier, it is our position initially that state statuates not affecting interstate commerce can only be challenged under the fourteenth amendment and therefore, Title VII's blanket application to the states is impermissible. (See Argument I). However, even if this Court should uphold Title VII's application to the states, a presumption of validity should nevertheless be indulged for any state statute challenged. Such a presumption would impose a greater burden of proof upon the plaintiff to show not only a prima facie case of invidious discrimination as discussed above, but also to affirmatively show that the state statute is not a business necessity. Appellants urge that such an increase in the proof required of a plaintiff is justified, not only by the tenth amendment and the status of the states, but also by the fact

that state records, legislative histories, and other relevant data showing any business purpose behind a statute are generally matters of public record. Therefore, the usual problems of discovery would be lessened. Even though the 1972 amendments to Title VII included states within their coverage, it is inconceivable that congress meant to lower the judgment of a state legislature to a par level with that of any other employer who might be challenged under the act. Title VII and the fourteenth amendment can subject the same state statute to two separate tests of validity, and could, conceivably find different results. *See Washington v. Davis*, 96 S.Ct. 2040 (1976). Surely if this diminishment of tenth amendment rights is to be indulged, a state statute should at least enjoy the rebuttable presumption of validity traditionally afforded it. *See generally McGowan v. Maryland*, 366 U.S. 420 (1961).

B. Title 55, §373(109), Code of Alabama (1940) (Recomp. 1958), Even If Prima Facie Discriminatory, Is Supported By A Valid Business Necessity.

Appellants contend that even if the plaintiff had established a prima facie case, the defendants were entitled to a judgment when they established a business necessity for the minimum height and weight requirements. The law is clear that if an employer can show the business necessity of a job-related procedure, he may impose that requirement even though it has a tendency to place an additional burden on a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In the case presently before the Court, the defendants clearly established that the minimum physical requirments were directly related to successful job performance. An

abundance of testimony was taken which established the physical nature of the duties of prison guards and of other law enforcement officers under the statute. The safety and efficiency in job performance offered by minimum size requirements is evidenced by their widespread use in other agencies. *See Smith v. Troyan*, 520 F. 2d 492 (6th Cir., 1975). Most of the requirements used are more restrictive than the Alabama 5'2", 120-pound minimums. Moreover, the job requirements of a prison guard in the Alabama system are undoubtedly more rigerous than those of many law enforcement jobs. As the Commissioner of the Alabama Board of Corrections testified, at least forty assaults on guards by inmates have occurred within the past three years. The Commissioner further explained that he included only wound-producing assaults within his estimate. (A. 120). He also stated that within those same three years, two guards were killed by riotous inmates. (A. 119). Unquestionably, the prison atmosphere in Alabama is physically dangerous. Nearly every guard in any of the major institutions is physically exposed on a daily basis to a population composed of persons with repeatedly proven violent propensities. Daily violence between inmates is not unusual. The unpredictable requirements on each guard manifest themselves in the violent nature of the environment and its population. Moreover, nearly every aspect of the guard's function is physical in nature. Such an environment poses a very real premium in many cases upon brute force, height, weight, and agility. Experience with these factors were no doubt behind Commissioner Locke's statement that he personally would prefer an even larger person than required by the relatively low minimums of 5'2", 120 lbs. (A. 139). Particularly interesting as well, is the fact that plaintiff's expert witness, Mr. Raymond Nelson, agreed that the job was sufficiently physical to require some limitation on size. (A. 211).

Appellants recognize and admit that the statutory minimums of 5'2", 120 lbs. did not result from any scientific validation study that established it as a minimum size for law enforcement officers. *See generally, Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). A lack of previous validation should certainly have no effect on this Court's unprejudiced view of those tests. As we argued above, and incorporate here by reference, the promulgated judgment of a state legislature should receive more deference when challenged than should an individual. This argument has special import in areas as inherently subjective as the establishment of a job-related employment criteria. (See Argument IV(A)(2)) By this proposal, appellants do not seek to evade any burden of esatblishing job relatedness, but only to decrease any prejudice to the requirements due to a lack of independent, scientific validation.

It is apparent from the consensus of opinions in the record as well as token mention by the court below that: (1) the job of prison guards is physical in nature in many aspects; (2) that height and weight have at least a "crude" relationship to strength (See Jurisdictional Statement at 41), and (3) that the physical nature of the job requires some minimum limitation on size (A. 211). The only remaining question then becomes where to establish the minimum. Undoubtedly any cutoff point will appear arbitrary when it attempts justification against another point only fractions lower. However, the need for a standard and the relationship of *that* standard to the job provides justification. Certainly a state should not be required to prove as a mathematical certainty that a person, 5'2" and 120 lbs., can *always* perform the many tasks of a guard, whereas a person of any size the least bit smaller could not. To so limit a state, or any employer, would provide very little margin for error in judg-

ment regardless of the validation precautions taken. In a job as uniquely varied as is law enforcement the diminishment of any margin of error could prove disasterous, if not fatal, to either the employer/officer or to one who depended upon him. Certainly the state employer before this Court owes its employers and the state populus, both inside and outside the walls of prison, a duty to *insure* that its law enforcement officers are physically equipped to handle their jobs. Facts showing that only a small percentage of actual time is spent in physical combat etc., do not negate the crucial need for physical potential capable of coping with those instances.

Neverthless, to insure a proper balancing between the state's interest and prospective employees, a waiver provision was included in the statute to allow the employment of applicants not meeting the height or weight minimums. Title 55, §373(109)(d), Code of Alabama (1940) (Recomp. 1958). The court below recognized these provisions yet found them to be fundamentally unfair due to their "informal" and "subjective" procedures. (See Jurisdictional Statement at 42). Appellants urge that the lower court's finding in that regard was unfounded.

Mr. James Jackson, the director of the Alabama Peace Officers Standards and Training Commission, administers any waiver requests. As he testified below, waiver requests are submitted in writing by *either* the hiring agency or an individual. (A. 165). Formal forms are admittedly not used. He then personally reviews the request and issues a waiver if the person's height and weight are reasonably proportionate. (A. 166). Naturally, this procedure requires some subjective judgment on his part as would any waiver request, however, this necessary element should not invalidate the whole provision.

In addition to finding the provisions procedures invalid, the court below also found that the waiver provisions were discriminatorily applied to Ms. Rawlinson, the prospective prison guard. (See Jurisdictional Statement at 42). This holding was evidently grounded in the fact that the Board of Corrections had not informed Ms. Rawlinson of the waiver provision, nor requested the waiver for her. The court below evidently assumed that the state had the burden to exhaust Ms. Rawlinson's employment possibilities for her, and that failure to notify her of possible waiver provisions produced great prejudice to her. It is difficult to believe that Ms. Rawlinson was in any way affected by the inaction of the state in this regard. It would have certainly been much simpler for her to affirmatively find out the existence of this waiver possibility and to exhaust its provisions, rather than to file and perfect all of the steps involved in a Title VII action with the EEOC.

Regardless of Ms. Rawlinson's actual actions, the appellants contend that the waiver provisions in the Alabama statute and their application produce no fundamental unfairness. Furthermore, the provision of this waiver further evidence the intent of the Alabama legislature to insure that all qualified persons have equal opportunity for jobs as law enforcement officers. It embodies a recognition that *any* standard, even though generally justified, may exclude some individual of adequate capabilities. This provision therefore further molds the statute to "measure the person for the job". *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). In light of the unique nature of the job, a less offensive measure is not plausible.

V. ASSUMING THAT TITLE VII IS CONSTITUIONALLY VALID IN ITS APPLICATION TO THE STATES, THE

ALABAMA BOARD OF CORRECTIONS ADMINISTRATIVE REGULATION 204 IS NEVERTHELESS VALID.

A. Plaintiffs Failed To Present Any Facts Showing Regulation 204 Was Prima Facie Sexually Discriminatory.

The court below apparently assumed, without finding, that Regulation 204 is explicitely sexually discriminatory. No mention is made by the court of plaintiff's evidence in this regard, nor of any minimum showing being found. Regardless of the court's assumption, it is the contention of the appellants that Regulation 204 is facially neutral and that no prima facie showing of sexual discrimination was made. As was pointed out above, Regulation 204 applies equally to both sexes. (See Argument III (B) (1).) This is not a case of disimilar sexual treatment, nor a case where "sex-plus" another factor imposed a individious discrimination to one sex. *See e.g. Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). It is the manifested intent of the Board of Corrections that neither men nor women should work in contact positions within penitentiaries housing prisoners of the opposite sex. The only gender based effect of the Regulation lies in the fact that there are more male prisoners than female in Alabama which, under Regulation 204, limits the number of available guard positions for females more severely than for males. Therefore, a disproportionate impact is suffered by women guards from the effect of Regulation 204. Again, without reiterating a prior argument, appellants contend that a prima facie case of discrimination is not established by showing merely a disproportionate impact. (See Argument IV (A) (1).) Appellants therefore contend that plaintiffs below failed to present a prima facie challenge to Regulation 204, and further, that the court below erred in

placing the burden upon the defendants to show some business necessity for the regulation.

B. Even If A Prima Facie Case of Sexual Discrimination Was Presented Against Regulation 204, It Is Still Valid Due To An Underlying Business Necessity.

Regulation 204 as stated above is the administrative tool used to assure that guards of one sex are not placed in contact postiions within penitentiaries housing inmates of the opposite sex. Appellants propose that the Regulation results in no invidious sexual discrimination against women guards. In addition, appellants contend that any sexual connotations within the Regulation are fully justified by the facts before this Court. While Regulation 204 poses no explicit sexual discrimination, similar regulations in prison-like facilities, even when explicitly gender based, have been found justified on the basis of bona fide occupational qualifications. *See e.g., Long v. California State Personnel Bd.*, 41 Cal. App 3d 1000, 116 Cal. Rptr. 562 (1974); *City of Philadelphia v. Pennsylvaina Human Relations Commission*, 7 Pa. Cmwlth 500, 300 A. 2d 97 (1973). Appellants urge that the justifications before this Court, as well as the minimal amount of infringment upon the opportunities of female guards, far exceed the justification for the classifications in the cases cited above.

The regulation itself gives the wardens the responsibility of identifying each guard position which they find requires selective classification. These wardens naturally are the people most familiar with each job. The following criteria are used to establish that selection certification is necessary:

1. That the presence of the opposite sex would cause

disruption of the orderly running and security of the institution.

2. That the position would require contact with inmates of the opposite sex without the presence of others.

3. That the position would require patroling dormitories, restrooms, or showers while in use during the day or night.

4. That the position would require search of inmates of the opposite sex on a regular basis.

5. That the position would require that the correctional counselor or trainee not be armed with a firearm.

These criteria attempt to remove such a decision from the purely subjective judgment of any individual. Appellant contends that their considerations are practically based.

The uncontradicted evidence reveals that by far the largest amount of correctional officers in the Alabama penal system are employed at the four major all-male maximum security institutions. These maximum security facilities utilize dormitory housing rather than single-cell accommodations. The showers and toilets are communal and open to the hallway. The job of a correctional counselor there is primarily to provide security in the institutions. This requires that they must be capable of performing strip searches, shakedowns, and physically subduing inmates when necessary (A. 113). Moreover, twenty percent of the male prison population are sex offenders. These prisoners are not isolated, but remain scattered throughout the system. (A. 149). In addition to the high percentage of sex offenders within the prisons, other factors have also occurred which bring to light the special danger to a female within such an environment. For example, one week prior to Commissioner Locke's deposition an inmate attempted to ravish a female clerical employee. (A. 142). On another occasion a female college student was taken hostage during a tour of the Draper prison unit. (A. 143). These experiences plus other problems encountered in the work release and youth centers where women guards are used in contact with male inmates, firmly support the Board's decision to limit contact between guards and inmates of the opposite sex in penitentiaries. (See Argument III (B) (3).)

Appellants readily agree, as the court below stated, that "women do not need protectors." (See Jurisdictional Statement at 37). Nevertheless, any employer would be remiss if he assigned his employees, or allowed them to assigned, whether they be male or female, to positions of unreasonable danger. In an all male maximum security prison, the disruptive influence caused by a female guard in close contact with the inmates should be a matter of innate recognition. No doubt a trained female guard is better equipped physically and mentally to deal with the confrontations imminent in a prison than would be a college coed. However, as all of plaintiff's experts pointed out, guards are an extreme minority in a prison requiring the use of psychological methods as a first defense. In such an environment, the weaknesses of a guard, whether perceived or real, are equally detrimental to control of institution, protection of inmates, aid to fellow guards, and self-preservation. These very real concerns of the Alabama Board of Corrections justify Regulation 204.

Plaintiff's evidence does little to impeach these conclusions. Mr. Raymond Nelson, called as an expert for the plaintiff, testified from his six months experience with the use of women in a single cell non-penitentiary institution. (A. 193). As he stated, women had been beneficial in many

ways at that institution. (A. 194). The institution was described as having non-communal toilets with private showers, single cell sleeping accommodations, and populated by inmates with generally less than one year remaining to serve. (A. 206). When he was asked in a hypothetical about the use of women in a facility similar to the Alabama penitentiaries he expressed serious reservations. (A. 196). The basis for his concern was obviously the contrast between his institution and a maximum security penitentiary with open communal toilet and shower facilities, and which houses long term inmates, 20% of which are incarcerated for sexual offenses. The latter type institutions are prevalent in Alabama. (A. 204).

Mr. C. Robert Sarver also testified for the plaintiff as an "expert". His testimony reveals that he has never supervised any women guards in a male prison institution, that he has made no particular study of their ability in such an environment, and that his only contact with such a situation was from a Florida jail he had briefly visited while preparing for another "expert" performance. (A. 87). Despite this obvious lack of experience in the matter, Mr. Sarver was undaunted in his favorable appraisal of the benefits to be gained from employing women guards in male penitentiaries. (A. 79). Appellants contend that this testimony adds little credible evidence to plaintiff's claim that Regulation 204 is unjustified.

Notwithstanding the obvious failing of plaintiff's case in this regard, the court below enjoined the enforcement of Regulation 204. In its opinion, the court found that the regulation was not consistent with the Board's position since women were in fact employed in contact positions at work release centers. The court makes no attempt to differentiate between the functions of a correctional officer or danger to such officers when supervising minimum security inmates of

proven adaptation to society, as opposed to those of proven vicious propensities in a penitentiary setting. The court's only concession to the Board's practical concerns was that the Department of Corrections could use selective work responsibilities among correction officers to preserve the privacy rights of inmates. However, no hint is given as to how this could be accomplised consistent with Title VII if not through a regulation just such as 204. Appellants propose that the lower court's finding is unsupportable. We submit that the procedures of Regulation 204 are job-related and that plaintiff has shown no other less offensive method that would serve the employer's legitimate interest with equal efficiency. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

CONCLUSION

For any court to declare invalid the statutory and regulatory products of a state's duly elected representatives and appointed agents is a grave undertaking. Only upon the most reliable grounds should such an endeavor proceed. This is especially concerning when the resultant order places final blame upon a state for fostering the social disease of discrimination.

Appellants urge that the court below misperceived the relevant legal, factual and moral considerations in the case at bar. We therefore ask this Court to reverse the holding of that court and reinstate the validity of both Title 55, §373 (109) Code of Alabama (1940) (Recomp. 1958) and Administrative Regulation 204.

Respectfully submitted,

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APPENDIX

AMENDMENT IX, CONSTITUTION OF THE UNITED STATES

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X, CONSTITUTION OF THE UNITED STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdication the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not

taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE 42 U.S.C. § 2000e

Definitions

For the purposes of this title [42 USCS §§ 2000e - 2000e-17]—
(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State govern-

ment, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(July 2, 1964, P. L. 88-352, Title VII, § 701, 78 Stat. 253; Sept. 6, 1966, P. L. 89-554, § 8, 80 Stat. 662; Mar. 24, 1972, P. L. 92-261, § 2, 86 Stat. 103.)

Discrimination because of race, color, relgion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification—Educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USC §§ 2000e-2000e-17], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on

the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42 USC §§ 2000e - 2000e-17], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USC §§ 2000e - 2000e-17], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any posi-

tion, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system—Ability tests. Notwithstanding any other provision of this title [42 USC §§ 2000e - 2000e-17], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USC §§ 2000e - 2000e-17] for any employer to differentiate upon the basis

of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)) [29 USC § 206(d)].

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USC §§ 2000-e - 2000e-17] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j)Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USC §§ 2000-2000e-17] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USC §§ 2000e - 2000e-17] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(July 2, 1964, P. L. 88-352, Title VII, § 703, 78 Stat 255; Mar. 24, 1972, P. L. 92-261, § 8(a), (b), 86 Stat. 109.)

CODE OF ALABAMA

TITLE 55, § 373(109) (1940) (Recomp. 1958)

Minimum standards for applicants and appointees as law-enforcement officers; employment of applicants; qualifications. — The minimum standards hereafter in this section provided shall apply to applicants and appointees as law-enforcement officers who are not law-enforcement officers in the state on the effective date of this article and to applicants and appointees who, though law-enforcement officers on the effective date of this article, cease to be law-enforcement officers before making application for employment as a law-enforcement officer or being employed as a law-enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on the effective date of this article a law-enforcement officer and who continues until the date of his application as a law-enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(a) Age. — The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(b) Education. — The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(c) Police training. — Prior to appointment, the applicant shall have completed at least 240 hours of formal police training, in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the Commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 9 months after provisional appointment and should he fail to complete such training, his appointment shall be null and void.

(d) Physical qualifications. — The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(e) Character. — The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the area in which the applicant proposes to serve as a law-enforcement officer attesting his good reputation.

The foregoing requirements shall not apply to any person who is presently employed as a law-enforcement officer in the state and who continues to be so employed when he makes application for or is employed as a law-enforcement officer in a different capacity or for a different employer. (1971, No. 1981, p. 3227, § 7, appvd. Sept. 20, 1971; 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

Selective Certification

Correctional Counselor I Positions

1. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective cerification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactory completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective

certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000c of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5, Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filed which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;

A. That the presence of the opposite sex would cause

disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedure established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect the power of the Commissioner to hire or discharge any employee.

V. REFERENCES

12. Title 45-2000C, United States Code

13. Letter from the General Council of the Equal Employment Opportunity Commission.

J. C. LOCKE, JR.
Commissioner

Annex A—(Same as No. 13)

Mr. J. C. Locke, Jr.
Commissioner
State of Alabama
Board of Corrections
Montgomery, Alabama 36104

Dear Commissioner Locke:

We have received your letter dated October 6, 1975 requesting an advisory opinion with regard to hiring only female correctional counselor trainees to work in all-female prisons, and only male correctional counselor trainees to work in all-male prisons.

We have noted in your letter that you are being funded by the Law Enforcement Assistance Administration (LEAA) to hire and provide training for correctional counselor trainees; that male correctional counselor trainees who are employed at all-female prisons are in non-contact slots (outergate and tower), and female correctional counselor trainees who are employed at all-male prisons are in non-contact slots (outergate and tower); that the job at issue calls for frequent inspection and patrol of restrooms and showers thereby invading the privacy of prisoners, and would place female employees in all-male prisons in danger of sexual or other attack due to sexual deprivation; that no firearms are carried by correctional counselor or security personnel; and that there is a low ratio of security personnel to inmates.

Please note that this letter is not an opinion letter pursuant to 29 C.F.R. §1601.30.

Section 703 (e) of Title VII of the Civil Rights Act of 1969, as amended, 42 U.S.C., 2000e-e), states as follows:

Notwithstanding any other provision of this title,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise . . .

The regulation at 29 C.F.R. §1604.2, 37 F.R. 6836 (April 5, 1972) states as follows:

(a) The Commission believes that the bona fide occupation exception as to sex should be interpreted narrowly. Labels—'men's jobs' and 'women's jobs'—tend be deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characteristics of the sexes . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities

and not on the basis of any the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

Many courts have interpreted the statute and regulations dealing with sex discrimination and the B.F.O.Q. exception.

Relevant Case Law

In cases analagous to the one at issue, courts have held that employers may rely upon the B.F.O.Q. exception in order to employ or to assign like-sexed employees to work with inmates in corrcetional institutions.

There are several cases which you should examine which are helpful in the analysis of the question you raise.

In *Long v. State Personnel Board,* Calif. Ct. App. 116. No. Cal. Rtpr. 562 (1974), 8 EPD Para. 9745, the court held that under Title VII,[1] there was no sex discrimination, due to application of the B.F.O.Q. exception, where the state refused to hire a female chaplain to work at an all male youth correctional institution. The Court said that generally there are three overall interests to consider: plaintiff's interest, the wards' interest and the public interest. The Court considered the safety problem for the female chaplain who would be counselling, frequently, quite far away from male employees, youths whose average age was 19½ and whose physical control could not be guaranteed. The Court also considered the element of privacy of the inmates who lived in

[1] The Court also found no violation under the Federal or State Constitutions.

various states of undress in their dormitories where the chaplain would be expected to be from time to time. Also see *City of Philadelphia v. Pennsylvania Human Relations Commission* 7 Pa. Commonwealth 500, 300 A2r-97 (1973), 5 EPD Para. 8538, where the Court held that under a state law where the definition of B.F.O.Q. was intended to be the same as the one under Title VII, the state must grant the City of Philadelphia a B.F.O.Q. exception for youth center supervisor jobs, allowing the city to hire only like sexed supervisors for single sexed youth correctional institutions. In this case, although the Court discussed and was concerned about danger to employees and the privacy of the inmates it was also concerned about the age of the inmates and their special counselling and privacy needs.

In *Reynolds v. Wise*, 378 F. Supp, 147 (N.D. Texas 1974) 8 EPO Para. 9778, the Court held that a female employee at a state correctional institution for adult males had to be returned to her job in the mail room which had previously been filled by a man who was given a rotation every six months, which rotation involved counselling and other contact with the inmates. The female was to be given these extra assignments when returned to the previous mail room job in the order to prepare her for promotions, but the Court also noted the following:

> Selecting work responsibilities among correctional officers excluding from the duties of women assignment to dormitories or shake-down is reasonable to insure privacy of inmates and does not discriminate against women. *Reynolds v. Wise, supra* at 151.

In those cases discussing correctional work done outside an institutional setting, the Courts examine the nature of the work. In *Button v. Rockefeller*, 6 EPD Para. 8835,

(N.Y. Sup. Ct. Sept. 10, 1973) a case brought under the New York Executive Law Section 296, the Court held that the State's hiring of four women as state troopers whose scores were below the scores of a male applicant, was not discriminatory because women were needed in order to search other women and do undercover work. On the other hand, the Court in *Tracey v. Oklahoma, Dept. of Correction*, § EPO Para. 9713 (W.D. Okl. May 23, 1974) found that there was nothing in the nature of the jobs as probation or parole officers which would justify using separate hiring lists. The Court found that these jobs did not fit within the B.F.O.Q. exception.

Although not concerning correctional officers, also of relevance to the question you raise is the case of *Hodgson v. Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3rd Cir. 1973) 5 EPO Para. 8434, *ce t. denied* 414 U.S. 866 (1973), 6 EPO Para. 8861, wherein one question was whether or not the Equal Pay Act was applicable in a situation where sex-segregated job classifications were permissible as a B.F.O.Q. The Appellate Court noted the finding by the District Court that there was a valid reason for having a sex segregated sales force, which was "the frequent necessity for physical contact because the sales persons and the customers which would embarrass both and would inhibit sales unless they were of the same sex." *Hodgson v. Robert Hall Clothes, Inc., supra* at 592 citing District Court opinion at page 1269.[2]

Conclusion And Recommendations

The statute, regulations and cases under Title VII sug-

[2] But see **Cianciolo t/a Galaxy Massage Parlor v. Members of City Council, Knoxville, Tennessee** 376 F.Supp. 719 (E.D. Tenn. 1974), 8 EPD Para 9708 where the Court found that the city ordinance prohibiting bisexual massages was in conflict with Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e - 2.

gest that you carefully evaluate each assignment in order to determine whether the B.F.O.Q. exception would apply. Some guidelines for you to consider when making your determination are as follows: the public interest and the interest of employees in minimizing danger, and the interest of the inmates in their own personal privacy. It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions. Wherever possible, these employees should be given the opportunity to perform their work with the state's firm guidance on curtailment of assignments which endanger the employees, the public and/or invade the personal privacy of the inmates. Since counselling should be stressed in order to upgrade the jobs involved, it is suggested that you can provide areas where employees and inmates can benefit from this part of the work, without regard to the sex of the employee or inmate.

If you need further information in the future, please do not hesitate to write again or to call.

Sincerely,

ABNER W. SIBAL
General Counsel

CERTIFICATE OF SERVICE

I, Walter S. Turner, Assistant Attorney General of Alabama, one of the attorneys for appellants, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 24th day of January, 1977, I served the requisite number of copies of the foregoing Brief of Appellants upon the attorneys for the appellee, by mailing the same to them, first-class postage prepaid, and addressed to them as follows:

Honorable Pamela Horowitz

Honorable John Carroll

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-422

E. C. DOTHARD, et al.,

Appellants,

v.

BRENDA M. MIETH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE APPELLEES

JURISDICTION

This is an action to enjoin the use of minimum height and weight requirements for prison guards and the exclusion of women from contact positions in male penitentiaries as sexually discriminatory in violation of Title VII of the Civil Rights Act of

1964, as amended, 42 U.S.C. § 2000e. It was filed in the United States District Court for the Middle District of Alabama, Northern Division. A three-judge court (Rives, Circuit Judge, and Johnson and Varner, District Judges) was properly convened pursuant to 28 U.S.C. § 2281.

In a unanimous opinion, issued on June 8, 1976, the District Court held that both the height and weight minimums and the exclusionary policy violated Title VII and entered an order accordingly.

Notice of appeal was filed on July 23, 1976, and on November 29, 1976, this Court noted probable jurisdiction. Jurisdiction is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Equal Employment Opportunity Act of 1972, which extended the benefits of Title VII to state and local government employees, is a valid exercise of congressional power under the Commerce Clause and/or the enabling clause of the

Fourteenth Amendment.

2. Whether minimum height and weight requirements, which have a substantial disparate impact on women and are not shown to be job related, violate Title VII's prohibition against sex discrimination in employment.

3. Whether, on the evidence presented, the exclusion of women from contact guard positions in male penitentiaries, embodied in Administrative Regulation 204, is within the permissible scope of the bona fide occupational qualification exception to Title VII.

STATEMENT OF THE CASE

Upon being rejected for consideration as a prison guard solely because she was five pounds under a statutorily imposed 120-pound weight minimum, Appellee Dianne K. Rawlinson initiated this class action, contending that the 5'2", 120-pound minimum height and weight requirements discriminated against women in violation of Title VII.[1/] While the suit

was pending, Defendant Board of Corrections promulgated Administrative Regulation 204, which provided that women would not be hired for contact positions in Alabama's male prisons and men would not be hired for contact positions in Alabama's lone female prison. Plaintiff Rawlinson then amended her complaint to include an allegation that Regulation 204 violated Title VII.

The District Court, relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that plaintiff established a prima facie case of sex discrimination by showing that the height and weight requirements eliminated approximately 41 percent of the women and less than one percent of the men, shifting the burden to defendants to prove that the height and weight criteria were job related.

The only testimony offered by defendants in support of the height and weight standards was Defendant Locke's unsubstantiated assertion that

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1/ Appellee Rawlinson had complied with the procedural requirements necessary to bring a claim under Title VII. (J.S. 32.)

they were related to strength. Plaintiff, on the other hand, submitted testimony from two expert witnesses that height and weight requirements bear absolutely no relationship to the ability to perform as a prison guard. Noting that more reliable methods were available to the State if it was really interested in testing strength, the District Court held that defendants failed to prove that the height and weight restrictions were job related and enjoined their use.

Defendants did not deny that Regulation 204 discriminated on the basis of sex. Instead, they sought to justify the discrimination by relying on the bona fide occupational qualification exception to Title VII, contending that women could not perform adequately as guards in male prisons and that their presence would infringe on inmate privacy. The District Court held that the burden of demonstrating a bfoq required "some objective, demonstrable evidence that women cannot perform the duties associated with the job." (J.S. 34.) Since the State employed women in contact positions at all-

male institutions other than penitentiaries, the court held that this burden was not met. In addition to the fact that the use of women in contact positions elsewhere in the system was "totally inconsistent" with the State's expressed concern for inmate privacy, the District Court found that any legitimate concerns about inmate privacy could be handled by means short of denying women the job, such as promulgating selective work responsibilities. Accordingly, the court enjoined the enforcement of Regulation 204.

SUMMARY OF ARGUMENT

This case raises issues of importance relative to the construction of Title VII's prohibition against sex discrimination. As a threshold matter, however, appellants now urge that Title VII, as applied to state and local government employees, is unconstitutional as beyond Congress' power. Apart from the fact that this question is not properly before the Court since it was not raised in the

District Court nor in the jurisdictional statement, *see, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), there is no merit to appellants' contention.

The 1972 Amendments to Title VII are within Congress' authority under the Commerce Clause and the enabling clause (§ 5) of the Fourteenth Amendment. Since Congress' power over commerce is clearly broad enough to encompass state and local government employees, its expansion of Title VII's coverage is supported by the Commerce Clause unless it unconstitutionally infringes on state sovereignty. *Cf. National League of Cities v. Usery*, ___ U.S. ___, 49 L.Ed.2d 245 (1976). The power to discriminate invidiously not being a legitimate "attribute of state sovereignty," the Title VII Amendments do not transgress an affirmative limitation on Congress' power and are thus valid under the Commerce Clause.

The legislative history of the 1972 Amendments indicates that Congress primarily relied on its power under § 5 of the Fourteenth Amendment. That amendment is the "centerpiece" of "the basic alteration in our federal system wrought in the

Reconstruction era." *Mitchum v. Foster*, 407 U.S. 225, 238-9 (1972). Accordingly, this Court consistently has recognized the impact of the Fourteenth Amendment on federal-state relationships, most recently in holding that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provision of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, ____ U.S. ____, 49 L.Ed.2d 614, 621 (1976). (Citation omitted.)

In upholding the constitutionality of § 4(e) of the Voting Rights Act of 1965, this Court explicitly rejected the argument that legislation under § 5 prohibiting the enforcement of state law may be sustained only if the judicial branch determines that the state law violates the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. 641, 648-9 (1966). *Katzenbach* thus forecloses any suggestion that the application of Title VII to the states may be upheld only to the extent that Title VII prohibits that which is unconstitutional. The 1972 Amendments are "appropriate" under § 5 if there is a rational basis

for Congress' conclusion that the amendments were necessary to further the aim of the Fourteenth Amendment. Since Congress had before it ample evidence of widespread discrimination by state and local government employers, its expansion of Title VII's coverage is rationally based and within the power granted to it by § 5 of the Fourteenth Amendment.

Turning to the Title VII claims,[2/] appellee submits that the District Court was correct in holding that the substantial disparate impact of the height and weight requirements on female applicants established a prima facie case of sex discrimination under Title VII. As this Court announced in *Griggs*, *supra*, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply

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2/ Since the District Court correctly did not reach the constitutional claims because it disposed of the case on statutory grounds, *see, e.g.*, Rosado v. Wyman, 397 U.S. 397, 402 (1970); Ashwander v. TVA, 297 U.S. 288 (1936), appellee has not briefed the constitutional questions. Should this Court reverse the District Court's resolution of the statutory claims, the case should be remanded for consideration of the constitutional issues. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975); Burns v. Alcala, 420 U.S. 575 (1975).

the motivation." 401 U.S. at 432. (Emphasis in the original.) That *Griggs* correctly interpreted Congress' intent is clear from the legislative history of the 1972 amendments, wherein Congress expressly approved of *Griggs* because of its focus on the absence of predictiveness of job performance when disparate impact was shown.3/

Once a prima facie case is made out, the burden shifts to the employer to prove that the disqualifying employment practice has a "manifest relationship to the employment in question." *Id.* Here the employer's sole contention concerning the job relatedness of the height and weight requirements was that they were related to strength. The State, however, failed to prove that strength would result in greater safety or efficiency on the job or that height and weight actually measures or predicts strength. In addition, plaintiff's experts testified that height and weight bear no relationship to the duties of a prison guard.

3/ *See, e.g.*, H.R. Rep. No. 238, 92d Cong., 1st Sess. 8, 21 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971); 117 Cong.Rec. 31961 (1971) (Remarks of Rep. Perkins).

The height and weight restrictions were thus revealed to be precisely the "artificial, arbitrary, and unnecessary barriers to employment" which *Griggs* forbids. *Id.* at 431.

Regulation 204 is a sex-based classification because it uses sex as the sole definitional factor in creating two classes: one to work in male prisons and the other in the female prison.4/ Defendants attempted to justify this discrimination by relying on the bfoq exception to Title VII. As this Court has noted, "Any exemption from . . . humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1942).

This Court has not had occasion to interpret the bfoq exception, but it is clear that the applicability of the exception is "a matter of evidence."

4/ In any event, the Regulation has a discriminatory effect since it excludes women from nearly 77 percent of all the correctional counselor positions within the Alabama Prison System. (J.S. 32.)

Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971). Where, as here, an employer attempts to come within the exemption by asserting that women are physically unable to perform the duties associated with the job, the employer should be required to offer factual data to support the assertion and should be required to show that it is not possible or practical to assess the physical capabilities of female applicants on an individual basis. The evidence in this case falls far short of the requisite showing.

Nor does the evidence establish that the need for inmate privacy brings the job within the bfoq exception. Appellee does not dispute the suggestion that there are certain duties associated with the job, such as strip searches, which normally require like-sexed guards for their performance. This fact standing alone, however, does not qualify the job for the exception. There must be a showing that it is implausible to separate the sexual from the non-sexual aspects of the job. The State offered no evidence at all that it could not resolve the problem as the District Court suggested, *i.e.*, by selective

work responsibilities. Moreover, as this Court has said with respect to the censorship of prisoner mail, "[T]he legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence." *Procunier v. Martinez*, 416 U.S. 396, 412-13 (1974). Surely the governmental interest in equal employment opportunities justifies certain limited infringements on inmate privacy.

The decision below should be AFFIRMED.

ARGUMENT

I.

INTRODUCTION

As this Court has observed, the legislative history relative to the inclusion of sex discrimination in Title VII of the Civil Rights Act of 1964 "is notable primarily for its brevity." *General Electric Co. v. Gilbert*, ____ U.S. ____, 45 L.W. 4031, 4036 (December 7, 1976). It is also true, however, that "over the past decade, Congress has

manifested an increasing sensitivity to sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). This increased sensitivity is clearly reflected in the House Report on the Equal Employment Opportunity Act of 1972,[5] which amended Title VII in an effort to strengthen its effectiveness. Noting that "there exists a profound economic discrimination against women workers," the Report states:

> Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. . . . Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. [6]

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[5] Pub.L. 92-261, 86 Stat. 103 (March 24, 1972).

[6] H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5 (1971). Other enactments which reflect Congress' cognizance of pervasive sex discrimination include Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., which prohibits sex discrimination in any "education program or activity receiving federal financial assistance;" the 1976 Amendments to the Omnibus Crime Control and Safe Streets Act, Pub.L. 94-503, 90 Stat. 2418 (Oct. 15, 1976), which permit the cutoff of federal funds to any state or local agency found to be engaged in sex discrimination; and the Equal Rights Amendment. An ERA had been (cont'd)

It is thus too late in the day to contend that Congress' inclusion of sex discrimination in Title VII represents a frivolous addition to an otherwise historic legislative enactment. To the contrary, Congress has recognized that sex discrimination in employment is a social and economic problem of nationwide proportions,[7] and Title VII is the vehicle it has chosen to combat the problem.

Appellee's position with respect to both the height and weight requirements and Regulation 204 is consistent with the congressional purpose behind Title VII's prohibition of sex discrimination.

Congress has expressed a desire to improve female

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introduced in every Congress since 1923 but seldom brought to the floor. In 1971 it passed the House by a vote of 354-23 and on March 22, 1972, the Senate passed it by a vote of 84-8. U.S. Dept. of Labor, *1975 Handbook on Women Workers*, Bull. 297, pp. 361-62.

[7] Between 1950 and 1974 the number of women in the nation's civilian labor force doubled. By 1974, they accounted for two-fifths of all workers with the vast majority of them working because of economic need. *Handbook, supra*, at 9, 124. Their disadvantageous position within the work force is well-documented. For example, in 1974 women who worked full time had median weekly earnings of $124, about 61 percent of the $204 earned by men. *Id.* at 126.

employment by requiring employers to use sex blind standards in hiring and assignments, except in narrowly defined circumstances. A substantial disparate impact on female applicants triggers the application of Title VII because it shows that women's job opportunities are being restricted by the hiring standard in question. Since an employer's interest in a non-job-related standard is minimal or nonexistent, it is proper at that point to require the employer to prove job relatedness. If he cannot do so, it means that he has been unduly restricting the pool of applicants, thus thwarting the congressional desire to maximize human resources.

In addition to fostering optimum use of our labor resources, Congress sought through Title VII to establish the principle that an applicant is to be evaluated on the basis of individual capability. Appellee and the class ask no more than when an employer attempts to deviate from this principle by invoking the bfoq exception, he be held to a burden of proof which prevents the exception from swallowing the rule.

II.

THE CONSTITUTIONALITY OF CONGRESS' EXPANSION OF TITLE VII TO STATE AND LOCAL GOVERNMENT EMPLOYERS IS NOT PROPERLY BEFORE THE COURT.

The long-standing principle that this Court will not consider issues neither raised in the court below nor presented in the jurisdictional statement is embodied in the rules of this Court[8/] and in its decisions.[9/]

That principle should be invoked with respect to the constitutionality of the extension of Title VII's coverage, which appellants did not raise before the District Court or in their jurisdictional statement but are now asking this Court to decide.[10/]

8/ Rule 15(1)(c) provides in pertinent part: "Only those questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court." Rule 40(1)(d)(2) admonishes that "the brief may not raise additional questions or change the substance of the questions already presented in [the jurisdictional statement]."

9/ *E.g.*, Adickes v. Kress & Co., 398 U.S. 144, 147 (1970); J.I. Case v. Borak, *supra*; Lawn v. United States, 355 U.S. 339, 363 (1958); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 179 (1938).

10/ Brief for Appellants at 16-29.

The salutary reasons behind the existence of the policy are especially apparent when the issue urged upon the Court concerns the constitutionality of a major Act of Congress. Apart from the fact that all constitutional questions should be presented with clarity and definiteness,[11] a requirement necessarily lacking when the lower court has not considered, much less decided, the issue, the United States has not had an opportunity to argue the question of Title VII's constitutionality as provided by 28 U.S.C. § 2403.[12]

11/ *Cf.* Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947), where the Court in discussing its policy of strict necessity in disposing of constitutional issues, stated: "The same policy has been reflected continually not only in decisions but also rules of court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions."

12/ 28 U.S.C. § 2403 provides as follows: "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to

(cont'd)

Under these circumstances, this Court should proceed directly to the merits of the Title VII claims presented herein.

III.

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, WHICH EXTENDED THE BENEFITS OF TITLE VII TO STATE AND LOCAL GOVERNMENT EMPLOYEES, IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE AND/OR THE ENABLING CLAUSE OF THE FOURTEENTH AMENDMENT.

A.

THE COMMERCE CLAUSE

"It is established beyond peradventure that the Commerce Clause of Art I of the Constitution is a grant of plenary authority to Congress." *National League of Cities, supra,* at 251. It is

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intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

also clear that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States. . . ." *Fry v. United States*, 421 U.S. 542, 547 (1975).

It cannot be seriously argued then that Congress' power over the labor market is not broad enough to embrace state and local government employees. Unless Congress has transgressed an affirmative limitation on the exercise of its power, its expansion of Title VII's coverage is a valid exercise of congressional authority under the Commerce Clause.[13/]

Congress' extension of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to employees of states and their political subdivisions was challenged in *National League of Cities*.

13/ The legislative history indicates that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers Congress exercised its power under § 5 of the Fourteenth Amendment. Fitzpatrick v. Bitzer, *supra*, at 620 n.9. There also are references to the commerce power. *E.g.*, 118 Cong. Rec. 1070, 1839 (1972).

The challengers, while admitting that the FLSA Amendments were within the scope of the Commerce Clause, contended that they were nonetheless an invalid restriction on state sovereignty. This Court said:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress. . . . One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. 49 L.Ed.2d at 253-4.

The Court went on to hold that these "determinations are 'functions essential to separate and independent existence,' so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 254. (Citations omitted.)

The States' power to discriminate invidiously is hardly a legitimate "attribute of sovereignty," let alone a "function essential to the States' separate and independent existence." The reasoning employed in *National League of Cities* to invalidate

the FLSA amendments thus has no application to the Title VII amendments.[14]

B.

THE FOURTEENTH AMENDMENT

The Fourteenth Amendment is by far the most prolific source of limits on the States.[15] In addition to the self-executing impact of the Amendment, Congress is given the power under § 5 "to enforce, by appropriate legislation," the Amendment's provisions. The question here is whether Congress' expansion of Title VII's coverage to include state and local government employers is "appropriate legislation" to enforce the Equal Protection Clause.[16]

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[14] *Cf.* Christensen v. Iowa, 45 L.W. 2086 (N.D. Ia., August 4, 1976), holding the equal pay provisions of the FLSA applicable to state employers notwithstanding *National League of Cities*. *Accord*, Brown v. County of Santa Barbara, 45 L.W. 2351 (C.D. Cal., January 14, 1977).

[15] G. Gunther and N. Dowling, *Constitutional Law* 786 (8th ed. 1970). The Amendment is the "centerpiece" of "the basic alteration in our federal system wrought in the Reconstruction era." Mitchum v. Foster, *supra*.

[16] United States v. New Hampshire, 45 L.W. 2087 (1st Cir., August 5, 1976), answered the question in the affirmative.

This Court already has upheld the award of money damages and attorney's fees against a state government found to have violated Title VII, holding that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer, supra.* The propriety of the application of the substantive, as well as the remedial, provisions of Title VII to state governments follows from this and other decisions of the Court.

Almost one hundred years ago, in examining the reach of congressional power under § 5, this Court said: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality against State denial or invasion, if not prohibited, is brought within the domain of Congressional power." *Ex parte Virginia,* 100 U.S. 339, 345-6 (1880).

More recently, this Court said, "By including

§ 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art I, § 8, cl 18." *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). Accordingly, *Katzenbach* held that the formulation of the reach of the Necessary and Proper Clause established in *M'Culloch v. Maryland* was the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional. 4 L.Ed. 579, 605 (1819).

Applying this standard, *Katzenbach* sustained the constitutionality of § 4(e) of the Voting Rights Act of 1965 as a valid exercise of Congress' power under the enforcement clause of the Fourteenth Amendment. In so doing, the Court explicitly held that an independent judicial determination of the unconstitutionality of the state law precluded

by Congress was not required to uphold the congressional enactment. In other words, the fact that a violation of Title VII may not in each instance make out a violation of the Fourteenth Amendment,[17/] does not render Title VII's application to state employers beyond Congress' power under the Fourteenth Amendment.[18/] As this Court said in *Katzenbach:*

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. 384 U.S. at 648-9.

17/ *See* Washington v. Davis, ____ U.S. ____, 48 L.Ed.2d 597 (1976).

18/ This is not to suggest that Congress' power under § 5 is unlimited. In Oregon v. Mitchell, 400 U.S. 112 (1970), the Court held, by a 5-4 vote, that § 5 did not give Congress the authority to lower the voting age for state elections. That congressional enactment, however, is clearly distinguishable from Title VII. For one thing, the Court emphasized the power of States to

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With respect to the statute before it, which had the effect of enfranchising certain Puerto Rican voters, the *Katzenbach* Court held that Congress rationally could conclude that it was an appropriate means of remedying discriminatory treatment in public services and was thus within Congress' power to enact.19/

The test for determining the validity of Title VII's application to state governments, then, is whether Congress could conclude that Title VII was an appropriate means of remedying discriminatory treatment in public employment.20/ Congress had before it ample evidence of the presence of employment discrimination in state and local governments.21/

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determine age qualifications for voting in their own elections. Secondly, the legislation was not aimed at a "discrete and insular minority." 400 U.S. at 296 (separate opinion).

19/ As an alternative ground for upholding the statute, the Court said that Congress had a rational basis for determining that the statute was necessary to eliminate an invidious discrimination.

20/ Under the alternative ground, *supra*, n.19, the question would be whether Congress could conclude that the state practices at which Title VII was aimed constituted invidious discrimination.

21/ *See, e.g.*, S. Rep. No. 415, 92d Cong., (cont'd)

It also had evidence that "the single largest group of employees in the nation are those employees who are employed by State, County and local governments"22/ and that "[f]ew of these employees . . . are afforded the protection of an effective Federal forum for assuring equal employment opportunity."23/ Moreover, it hardly could be argued that Title VII represents an unwarranted federal intrusion upon any legitimate state interests since the denial of employment on the basis of "race, color, religion, sex, or national origin" does not promote the States' legitimate interest in assuring competent and responsible public employees.

Since Congress rationally determined that "employees of State and local governments are entitled to the same benefits and protections in equal employ-

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1st Sess. (1971). Indeed, one study upon which Congress relied indicated that "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*

22/ 118 Cong. Rec. 1393 (1972)(Testimony of William H. Brown III).

23/ S. Rep. No. 415, *supra*.

ment as the employees in the private sector of the economy,"[24] the expansion of Title VII's coverage was within the reach of congressional authority under § 5 of the Fourteenth Amendment.

IV.

MINIMUM HEIGHT AND WEIGHT REQUIREMENTS, WHICH HAVE A SUBSTANTIAL DISPARATE IMPACT ON WOMEN AND ARE NOT SHOWN TO BE JOB RELATED, VIOLATE TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION IN EMPLOYMENT.

A.

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF SEX DISCRIMINATION UNDER TITLE VII BY SHOWING THAT THE MINIMUM HEIGHT AND WEIGHT REQUIREMENTS HAVE A SUBSTANTIAL DISPARATE IMPACT ON WOMEN.

In *Griggs v. Duke Power Co.*, *supra*, this Court held that the requirement of a high school diploma or of passing a standardized general intelligence test as a condition of employment violated Title VII where each requirement operated to disqualify

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[24] *Id.*

blacks at a substantially higher rate than white applicants. In so doing, the Court rejected the lower court's conclusion that a subjective test of the employer's intent should govern and that, because there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements, there was no violation of Title VII:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. 401 U.S. at 432. (Emphasis in the original.) [25]

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[25] That the *Griggs* rationale applies to all forms of prohibited discrimination under the Act and not just racial discrimination is clear from several of the opinion's passages: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial *or other* impermissible classification." 401 U.S. at 431. "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that *race, religion, nationality, and sex* become irrelevant." *Id.* at 436. (Emphases supplied.)

Thus, although the Court recently has held that a discriminatory purpose is necessary to establish a constitutional violation,[26] the test under Title VII is one of impact and not intent.[27] The correctness

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[26] Washington v. Davis, *supra*.

[27] Neither Washington v. Davis, *supra*, nor General Electric Co. v. Gilbert, *supra*, repudiates *Griggs'* "effect only" test. In *Washington* the Court said, "Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment. . . ." 48 L.Ed.2d at 606. In *Gilbert* the Court said, "[O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." 45 L.W. at 4034. (Emphasis in the original.) Moreover, in concurring opinions, two members of the six-man majority in *Gilbert* specifically reaffirmed the continuing vitality of *Griggs*. *Id.* at 4037. (Concurring opinions of Justices Stewart and Blackmun.) The principle of stare decisis, as it applies to matters of statutory construction, also strongly counsels in favor of *Griggs'* continued vitality. As Mr. Justice Brandeis said, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, providing correction can be had by legislation." Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406 (1932) (dissenting opinion). Here Congress not only has not seen fit to correct the rule of law announced in *Griggs*, it has expressly approved it. *See* n.30, *infra*, and text thereto.

of *Griggs'* holding that intent is not required to establish a prima facie violation of the Act is abundantly clear.

Section 706(g), 402 U.S.C. § 2000e-5(g), provides in pertinent part: "If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, ..." The lower courts consistently have interpreted this to mean that Title VII requires only an intention to engage in the challenged practices, not an intention to use those practices to discriminate,[28] and the legislative history

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[28] Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

supports this view.[29]

Even more important, Congress, in revising Title VII in 1972, expressly endorsed the use of the "effect only" test enunciated in *Griggs*, noting the "increasingly complex" "forms and incidents of discrimination" that "may not appear obvious at first glance."[30] Moreover, the Conference Report on

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[29] "The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders." 110 Cong. Rec. 12724 (1964)(Remarks of Sen. Humphrey). Senator Dirksen introduced an amendment proposing that only willful discrimination be prohibited: "The words 'willful' and 'willfully' as ordinarily employed, mean nothing more than the person, of whose actions or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent. . . . The terms are also employed to denote an intentional act . . . as distinguished from an accidental act. . . ." 110 Cong. Rec. 8194 (1964). Although his amendment was defeated, Senator Dirksen was the co-author of the bill that ultimately passed and his view of intention no doubt prevailed in the final version.

[30] *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1971).

the 1972 Amendments to Title VII states:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 7166.

Griggs' "effect only" test is thus consistent with clearly expressed congressional intent. The only question is whether it was correctly applied in the instant case.

The District Court held that plaintiff established a prima facie case by showing that when the height and weight restrictions are combined, they disqualify approximately 41 percent of the women in the United States between the ages of 18-79 compared to less than one percent of the men. (J.S. 32.) Understandably, appellants do not deny that this satisfies the "markedly disproportionate impact" required by *Griggs*.[31] They contend only that the

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[31] The Court has not numerically defined the showing required to prove a "markedly disproportionate impact." In *Griggs*, however, census statistics showed that while 34% of white males had completed high school only 12% of black makes had done so, 401

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statistical proof fails because it does not show comparative results, *i.e.*, the effect of the height and weight restrictions on actual applicants. As one commentator has noted, however:

> A self-defining "test" such as height is easily ascertainable by anyone considering applying for the position . . . . Unlike failure to pass an aptitude or physical agility test or interview, the certainty of success or failure with regard to a height standard can be pre-determined by would-be applicants. Thus, almost all of the individuals who actually make application will most likely be drawn from that group which collectively meets or is very close to meeting the height standard.32/

In other words, minimum height and weight requirements do not discriminate solely against applicants who are not hired, but also against all who learn of the requirements and do not apply

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U.S. at 430 n.6, which is a lesser disparity than that shown in the case *sub judice*.

32/ Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII*, 47 So.Cal.L.Rev. 585, 599 (1974).

because they fail to meet them.33/ Since the impact of the requirements on potential employees cannot

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33/ This fact illustrates the correctness of the District Court's conclusion that the waiver provision contained in the statute did not negate the operative discriminatory effect of the height and weight standards. The court found that the Board of Corrections had "no standard procedure to inform the applicant of his or her right to request a waiver." (J.S. 30.) Since potential applicants had no way of knowing that the requirements could be waived, their very existence would discourage a person who knew of the requirements and failed to meet them from ever applying. Although the Director of the Alabama Peace Officers Standards and Training Commission testified that either an individual applicant or the hiring agency could request a waiver (A. 165), the record shows that Appellee Rawlinson was never notified to that effect. Her rejection letter stated, "Since you do not meet the minimum weight requirements . . . , we regret that it was necessary to turn down your application . . . ." No mention was made of the fact that she could seek a waiver. (Pl. Ex. 17; R. 400, 1056; J.S. 30.) Moreover, the District Court found that the Board of Corrections had never requested a waiver of the height and weight requirements. (J.S. 30.) Finally, the evidence is surely adequate to support the District Court's finding that the "waiver provided by the statute has developed into a remarkably informal and subjective administrative procedure" that "hardly comports with fundamental fairness." (J.S. 41-2.)

be discerned by searching the employer's records, the proper approach is to measure the at-large percentage against the height and weight criteria at issue.[34/]

The District Court having correctly held that plaintiff made out a prima facie violation of Title VII by showing that the height and weight requirements have a substantially disproportionate impact on women, the burden shifted to the State to prove that the requirements have a "manifest relationship to the employment in question." *Griggs, supra,* at 432.

34/ The fact that the height and weight requirements disqualify 41% of the female population and only 1% of the male is thus sufficient to establish a prima facie case. Moreover, in the instant case the existence of a prima facie violation was bolstered by proof that while females comprise 37% of Alabama's labor force in the 20-44 year age bracket, they occupy only 13% of the correctional counselor positions in the entire Alabama prison system and only 4% of the correctional counselor positions at the all-male penitentiaries. (J.S. 31-2.) In addition, until 1974 no females were hired for correctional positions in other than the female prison. (A. 107, 289.)

B.

THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROVING THAT THE HEIGHT AND WEIGHT REQUIREMENTS ARE JOB RELATED.

When this Court ruled that a disqualifying employment practice must be shown to be job related in order to survive a Title VII challenge, it said, "The touchstone is business necessity." *Griggs, supra,* at 431. Clearly, then, it is not enough that the employer simply articulate some reason for the existence of the practice. He must offer proof that the practice is necessary to safe and efficient job performance. In the present case the employer made no such showing.

The Director of the Alabama Peace Officers Standards and Training Commission, the body charged with administering the height and weight standards, testified that he had no idea how 5'2" and 120 pounds were determined to be appropriate limits.[35/]

35/ *Cf. Griggs, supra,* at 431: "Both [the diploma and test requirements] were adopted . . . without meaningful study of their relationship to job performance ability."

(A. 164.) He further testified and the District Court found that the Commission has never obtained the services or advice of experts in the field of law enforcement as to the pertinence of the height and weight standards.[36/] (A. 165, J.S. 40.) In fact, the Commission has never reviewed or even discussed the 5'2", 120 pounds limits.[37/] (A. 163, J.S. 40.)

The only testimony the defendants did offer in support of the job relatedness of the height and weight requirements was the unsubstantiated assertion of Defendant Locke that the requirements were related to strength.[38/] (A. 114.) Apart from the fact that

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36/ Under the statute "the Commission has the power to obtain the services and advice of experts in the field of law enforcement for the purposes of aiding the Commission in its studies, considerations, reports and recommendations, and the adoption of standards, rules and regulations." (A. 165.)

37/ The statute provides that "the Commission has the power to review from time to time the minimum standards hereinafter described for applicants for and appointees as law enforcement officers." (A. 161.)

38/ Appellants' statement that "[t]he court below apparently assumed that the entire burden of justifying the act was upon the shoulders of Commissioner Locke" (Brief for Appellants at 32) amounts to an admission that they not only failed to offer any other evidence to support the height and weight (cont'd)

defendants failed to prove that physical strength was a necessary requirement for effective job performance, they did not establish that height and weight either measures or predicts strength. Even assuming, *arguendo*, that strength is a facet of effective job performance and that height and weight bear some relationship to strength, defendants did not justify their 5'2", 120 pounds cutoffs.[39/] The District Court said, "[W]e are unconvinced that a person below an arbitrarily defined level would invariably lack the necessary strength to perform the required tasks."[40/] (J.S. 40.)

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requirements, but also that Locke's testimony was inadequate to sustain their burden of proof.

39/ Indeed, if there were merit to Defendant Locke's "bigger is better" rationale, it is strange that the Board of Corrections did not elect to raise the minimum height and weight requirements for prison guards, as the Department of Public Safety elected to do with respect to State Troopers.

40/ The District Court also noted that "[i]f strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength." (J.S. 41.)

While defendants failed to offer any expert testimony in support of the height and weight requirements, plaintiff "submitted testimony from two expert witnesses that height and weight have absolutely no relationship to the duties performed by a correctional counselor."[41/] (*Id.*)

Far from being job related, the height and weight requirements were thus revealed to be "artificial, arbitrary and unnecessary barriers to employment" forbidden by *Griggs*. 401 U.S. at 431.

41/ Appellants state that one of these experts, Mr. Raymond Nelson, "agreed that the job was sufficiently physical to require some limitation on size," citing pp. 55-56 of his deposition. (Brief for Appellants at 44.) An examination of that portion of Warden Nelson's testimony reveals that he had reference to a hypothetical person standing four feet tall and weighing seventy-five pounds. (A. 211.)

V.

ON THE EVIDENCE PRESENTED, THE EXCLUSION OF WOMEN FROM CONTACT GUARD POSITIONS IN MALE PENITENTIARIES, EMBODIED IN ADMINISTRATIVE REGULATION 204, IS NOT WITHIN THE PERMISSIBLE SCOPE OF THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION TO TITLE VII.

A.

THE EXCLUSION OF WOMEN FROM CONTACT GUARD POSITIONS IN MALE PENITENTIARIES, EMBODIED IN REGULATION 204, VIOLATES TITLE VII UNLESS IT IS WITHIN THE PERMISSIBLE SCOPE OF THE BFOQ EXCEPTION.

It is clear that "[plaintiff], who seek[s] to establish discrimination, [has] the traditional civil litigation burden of establishing that the acts [she] complains[s] of constituted discrimination in violation of Title VII" and that "[a]bsent a showing of gender-based discrimination, as that term is defined in *Geduldig*, or a showing of gender-based effect, there can be no violation of § 703(a)(1)."[42/]

42/ General Electric Co. v. Gilbert, *supra*, at 4034 n.14, 15.

Appellants now argue that Regulation 204 does not violate Title VII because, while it prohibits women from working in contact positions in male penitentiaries, it also excludes men from contact positions in the female prison. There is no merit to this contention.

Geduldig v. Aiello, 417 U.S. 484 (1974), involved a claim that California's exclusion of pregnancy-related disabilities from its insurance program constituted sex discrimination.[43/] In rejecting the claim, this Court said:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. 417 U.S. at 497 n.20.

43/ *Geduldig* arose under the Fourteenth Amendment. A similar claim, grounded on Title VII, was rejected in General Electric Co. v. Gilbert, *supra*.

There is no "lack of identity" between the excluded jobs and "gender as such" under Regulation 204. The Regulation divides potential employees into two groups -- male and female.

Moreover, as *Geduldig* recognized, even the lack of sex-based discrimination as such does not end the analysis, should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Id.* In the instant case, the District Court found that "Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries has been implemented" (J.S. 25) and there is ample evidence in the record to support this finding.[44/]

Finally, plaintiff clearly has demonstrated

44/ *See, e.g.*, A. 128, 134. In this connection it is worth noting that Alabama has even seen fit to employ a male *warden* at its lone female prison. (A. 283.)

a gender-based discriminatory effect resulting from the operation of Regulation 204. The District Court found that of the total number of correctional counselors hired by the Alabama Prison System, 77 percent are employed in the four all-male penitentiaries.45/ (J.S. 32.) Since the vast majority of these jobs involve contact with inmates, Regulation 204 operates to exclude women from nearly 77 percent of the available guard positions.

Since plaintiff has met her burden of proving that Regulation 204 constitutes sex discrimination in violation of Title VII, the Regulation cannot stand unless it is within the scope of the Act's bfoq exception.

B.

THE BFOQ EXCEPTION MUST BE NARROWLY CONSTRUED.

As this Court has stated with respect to the

45/ By contrast, only 26, or 6%, of the 435-member guard force, are employed at the all-female prison. (J.S. 26.)

Fair Labor Standards Act:

> Any exemption from such humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. *Phillips Inc. v. Walling, supra.*

A narrow construction of Title VII's bfoq exception is supported by both the statutory language and the legislative history, as well as by lower court decisions and EEOC guidelines.

In pertinent part § 703(e) provides as follows: "It shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..." Close scrutiny of the language of the exception compels the conclusion that it should be construed narrowly. As one commentator has

said:

> [T]he sentence contains several restrictive adjectives and phrases: it applies only "in those certain instances" where there are "bona fide" qualifications "reasonably necessary" to the operation of that "particular" enterprise. The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening [an] enormous gap in the law 46/

The same conclusion is gleaned from the legislative history. Judging by the few examples offered where sex would be a bfoq, Congress saw the exception as a limited one. For example, Senators Clark and Clifford, the floor managers of the Act, submitted an interpretative memorandum of Title VII which stated: "This [bfoq] exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be . . . the preference of a professional

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46/ White, *Women in the Law*, 65 Mich.L.Rev. 1051, 1103 (1966).

baseball team for male players." 110 Cong.Rec. 7213 (1964). Similarly, very few examples of sex as a bfoq were cited during the floor debate. *Id.* at 2549-50.

Moreover, as noted earlier, the Conference Report on the 1972 Amendments to Title VII states: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166. In making this statement, Congress presumably was aware that the courts had interpreted the bfoq exception very narrowly.47/

Finally, a narrow construction of the bfoq exception is consistent with the guidelines of EEOC.48/ Starting with the proposition that "the

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47/ *E.g.*, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (7th Cir. 1971); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969).

48/ While this Court has held that EEOC guidelines are entitled to "great deference" in construction of the Act, *Griggs*, *supra*, at 433-4, the Court, in deciding *Gilbert*, *supra*, refused to follow the EEOC (cont'd)

bona fide occupational qualification exception as to sex should be interpreted narrowly," the guidelines provide in pertinent part:

> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> > (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. . . .
> >
> > (ii) The refusal to hire an individual

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guideline in question there. In so doing, the Court cited Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), where it was said: "The weight of [an agency guideline] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." The EEOC guideline before the *Gilbert* Court "[did] not receive high marks when judged by the standards enunciated in *Skidmore*," 45 L.W. at 4036, because it was not a contemporaneous interpretation of Title VII (first having been promulgated in 1972) and because it conflicted with earlier pronouncements of the agency. Moreover, as the Court noted, "The EEOC guideline . . . stands virtually alone." *Id.* The guideline at issue here suffers from none of these defects. It was issued on November 24, 1965, and its pertinent provisions have never been contradicted by the agency. *See* 29 CFR § 1604.1 (1966). Far from "standing alone," the guideline is consistent with other indicia of the proper interpretation of the bfoq exception.

> based on stereotyped characterizations of the sexes. . . . The principle of non-discrimination requires that individuals be considered on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . . . 29 CFR § 1604.2(a).

Against this background, the District Court's determination that sex is not a bfoq for the job of prison guard is manifestly correct.

C.

DEFENDANTS DID NOT MEET THEIR BURDEN OF PROVING THAT WOMEN ARE UNABLE TO PERFORM THE DUTIES ASSOCIATED WITH THE JOB.

In attempting to defend Regulation 204 as within the bfoq exception, defendants primarily relied on the contention that "women would not be able to perform adequately and safely within the setting of an all-male penitentiary." (J.S. 43.)

The District Court held, as a matter of law, that "labeling a job as 'strenuous' and then relying on the stereotyped characterization of women will

not meet the burden of demonstrating a bfoq" and that "there must be some objective, demonstrable evidence that women cannot perform the duties associated with the job." (J.S. 34.) The Court's conclusion is clearly consistent with congressional intent and with EEOC guidelines. *See* pp. 44-49, *supra*. To permit an employer to rely on sexual stereotypes in place of factual data would allow the exception to swallow the rule.[49/]

[49/] This Court consistently has refused to accept sexual stereotyping as a justification for statutory classifications that distinguish between males and females when such statutes have been challenged under the Equal Protection Clause. Summarizing these decisions, the Court recently stated: "[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported to fact." Craig v. Boren, ____ U.S. ____, 45 L.W. 4057, 4059 (December 20, 1976). (Citations omitted.)

Appellee would urge further that the employer be required to show that it is not possible or practical to assess the physical capabilities of female applicants on an individual basis. Title VII provides a foundation in law for the principle of non-discrimination. "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 CFR § 1604.2(a)(1)(ii). Thus, even if it is correct to assume that *some* women would be physically unable to perform a given job, that should not be a permissible basis for excluding *all* women from consideration unless the employer can show that it is impossible or impractical to evaluate each female applicant individually. This is particularly true where, as here, it is safe to assume that some men are physically unable to perform the job in question.

Judged by these standards, the evidence presented here fails to establish that sex is a bfoq. At the outset, it should be noted that

defendants offered no evidence as to women's asserted lack of ability other than their own and their employees' testimony. Much of their evidence thus amounts to nothing more than employer "preferences."50/ Such preferences do not, under 29 CFR § 1604.2(a)(1)(iii), warrant the application of the bfoq exception and are no substitute for objective, demonstrable evidence.

50/ *E.g.*, "If I am going to go down here into a riotous situation, I want a male with me." (Locke Deposition, A. 151.) The impropriety of relying on employers' preferences or subjective doubts is illustrated by the experience of Raymond Nelson, one of plaintiff's expert witnesses. Mr. Nelson had 17 years of correctional experience before assuming his position as Warden of the Metropolitan Correctional Center (A. 178), during which time he had never utilized women as correctional officers in a male correctional facility (A. 183). He testified that he had "personal doubts" about using women when he started his job at Metropolitan: "I had some concerns as to what kind of positions they could work in with men. I was concerned about whether they could work isolated on a unit . . . and work there by themselves. I was concerned about whether they could work the shifts . . . . I was concerned about them working in an open dormitory . . . . And, I was concerned about them working in our isolation unit." *Id.* He now says about his female officers, who perform the same duties as their male counterparts with the exception of strip searches, "The performance of the women is very satisfactory and you cannot compare them as one sex to another." (A. 185.) His "very strong feelings" of six months before "have proven not to be too valid." (A. 187-188).

Moreover, the testimony clearly reveals that defendants' doubts about the ability of women to perform the work involved are based in large part on impermissible stereotypes. When Defendant Locke was asked why women were limited to non-contact positions, he replied:

> Because there is a basic difference in the -- between a female and a male, which renders her less capable of physically subduing or protecting herself or subduing an inmate, . . . and also . . . her mere physical presence, in my opinion, . . . would incite trouble and there is a sexual connotation which should go without saying. She is a sex object. (A. 111.)

At other points in his testimony, Defendant Locke relied on "the general opinion of the public toward a woman, a mother image vs. the male" (A. 144); "the mental attitude that the male has, his male ego vs. the female" (A. 147); and "the superior feeling that a man has, historically, over that of a female." (A. 153.) Similarly, Bill Gilmore, Director of the Frank Lee Youth Center, explained why a woman cannot work effectively thusly: "[The male inmate] recognizes probably softness on her

part to start with. It is synonymous with your mother-father situation. Often times we will argue and sometimes can get away with more with our mothers. But when your father is involved, you tend to go ahead and fall in line earlier," adding, "I think most of [the inmates] have . . . a certain feeling about the role of a female and where her function is in society. I think this is something that they share with most males." (A. 291-292.)

The defendants also sought to rely on "[t]he overcrowding, violence, and other deplorable conditions [in Alabama's prisons] that led to the court order in *James v. Wallace.*" (J.S. 43.) *James v. Wallace*, 406 F.Supp. 318 (M.D. Ala. 1976), was tried and decided by Judge Frank M. Johnson, Jr., one of the members of the three-judge court in the case *sub judice.*[51/] The court below was thus intimately

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51/ It might be noted that the court order in James v. Wallace is going to result in substantial improvements in the Alabama Prison System, a fact which defendants readily admitted. (A. 120-121.) Among other things, the prison administrators were ordered to implement a classification system, 406 F.Supp. at 333, and to hire additional guards. *Id.* at 335. Appellants' reliance on Warden Nelson's (cont'd)

familiar with conditions in Alabama's prisons, a factor which accords special weight to its determination that those conditions do not dictate the exclusion of women as guards.[52/]

The District Court found that the State "employ[s] females in contact positions at all-male institutions other than the four large penitentiaries. . . . who perform the identical duties of their male colleagues, with the exception [of] naked searches and frisks . . . ." (J.S. 43.) The court regarded the satisfactory performance of women at the other male institutions[53/] as persuasive

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response to a "hypothetical about the use of women" (Brief of Appellants at 52) is thus misplaced because the hypothetical does not take into account the changes in Alabama's prisons pursuant to the court order.

52/ *Cf.* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 n. 20 (1974), where the Court refers to the "salutary principle that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances."

53/ At one of the all-male institutions a female was on patrol alone in a dormitory three nights a week and had been for 8-9 months, with no resultant security problems. (A. 299.) The Director of

evidence that women could perform adequately in the male penitentiaries. Appellants' assertion that the court failed to consider the difference between supervising "inmates of proven adaptation to society" versus "those of vicious propensities in a penitentiary setting" (Brief of Appellants at 52-53) is groundless since, as noted above, the District Court possessed intimate knowledge of Alabama's penitentiaries and their inmates.

The correctness of the District Court's holding that a bfoq was not established is further supported by the testimony of plaintiff's expert witnesses. As discussed, *supra*, n.50, Mr. Raymond Nelson, who has twenty years' experience in the corrections field (J.S. 40) and presently supervises female guards in a male maximum security facility (A. 179-180),

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another all-male institution testified that one of the two female guards under his supervision "is a good employee." (A. 270.) The District Court found that his opinion that women do not perform as well as men "seems in large measure attributable to the performance of one female correctional counselor under this supervision," and noted, "This is no reason, . . . that all women cannot adequately perform." (J.S. 43.)

testified that "[t]he performance of the women is very satisfactory and you cannot compare them as one sex to another. I would say, if you were comparing sex, there is no difference."[54/] (A. 185.) Mr. Robert Sarver, an experienced prison administrator who is personally familiar with the Alabama Prison System (A. 73, 79-80) testified that there is no reason why women should not be hired and assigned as correctional officers in the Alabama system on an equal basis with men. (A. 84.)

The evidence thus fails to establish that defendants' assertion that women are unable to perform adequately and safely in an all-male penitentiary, actually comports to fact. Moreover, to the extent that some women may not be able to perform the duties associated with the job, defendants

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54/ Warden Nelson's testimony directly contradicts defendants' contention that female guards are a disruptive factor and do not command the respect of male inmates. He testified that "[t]he reaction of inmates [to female guards] is generally positive" (A. 186) and that "the inmates are almost responding without command from the woman detail officer." (A. 213.)

made no showing that it is impossible or impractical to assess the capabilities of female applicants on an individual basis.[55/]

Appellants state, "Notwithstanding the obvious failing of plaintiff's case . . . , the court below enjoined the enforcement of Regulation 204." (Brief of Appellants at 52.) The burden of proving a bfoq was on defendants, not plaintiff, and it is they who failed to prove their case.

D.

DEFENDANTS DID NOT ESTABLISH THAT THE NEED FOR INMATE PRIVACY BRINGS THE JOB WITHIN THE BFOQ EXCEPTION.

As a secondary ground in support of Regulation 204 defendants advanced the prisoners' right of privacy. In addition to the fact that the use of women in contact positions elsewhere in the system was "totally inconsistent" with the State's

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55/ Even Tony Sewell, Director of the Mobile Work Release Center, testified that women should be hired on the same basis as men "if they can establish their ability to have control." (A. 267.)

expressed concern for inmate privacy, the District Court found that "this tension between the individual's right to employment without regard to his or her sex and the inmate's right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications."[56/] (J.S. 44, 45.)

Again the District Court properly construed the bfoq exception, giving due regard to the plain import of the statutory language and the intent of Congress.[57/] The use of the word "necessary" in

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56/ After stating that "[t]he only concession to the Board's practical concerns was that the Department of Corrections could use selective work responsibilities among correction officers to preserve the privacy rights of inmates," appellants aver, "[N]o hint is given as to how this could be accomplished . . . if not through a regulation just such as 204." (Brief of Appellants at 53.) This is patently absurd since Regulation 204 does not provide for "selective work responsibilities" but rather totally excludes women from consideration for the job.

57/ The District Court's resolution of this issue is also consistent with this Court's decisions involving prisoners' rights. As this Court has said, "[T]he fact that prisoners retain rights under the [Constitution] in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully

(cont'd)

§ 703(e) commands that, where a less restrictive alternative is available short of denying women the job, the court require the employer to avail himself of the alternative. Further, as one commentator has written:

> There [exists] a wide range of jobs which require a multitude of duties, only some of which demand a particular sex for their performance. For such positions, the need for one sex to perform a particular duty is insufficient in itself to qualify for the [bfoq] exception. Were this not the case, employers could too easily avoid the strictures of section 703(a) by so defining their jobs as to include at least one duty capable of fulfillment

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committed. . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). The use of selective work responsibilities represents a "mutual accommodation" between the objective of promoting equal employment opportunities and the inmates' right to privacy. *See also* Procunier v. Martinez, 416 U.S. 396, 412-13 (1974), where the Court said with respect to the censorship of prisoner mail, "[T]he legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence." Surely the governmental interest in equal employment opportunities justifies limited infringements on inmate privacy.

> by only one sex. If an employer can establish that sex is essential to a particular duty, a second level of inquiry should focus on whether it is plausible to require the employer to separate the sexual from the nonsexual aspects of the job.58/

The establishment of a bfoq in situations where, as here, the job has sexual and nonsexual aspects, is thus a two-step process: first, the employer must identify those duties which can only be performed by one sex; then he must show that it is not plausible to separate such duties from those that can be performed by both sexes.59/

In the case *sub judice* defendants in effect admitted that the only duty which requires a male guard is the performance of strip searches -- since

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58/ *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1183 (1971).

59/ Given the employer's superior knowledge of the job's duties, it would seem proper that the burden be on him to show that it is not plausible to separate the sexual from the nonsexual. If this Court holds, however, that the burden should be on plaintiff to prove that it is plausible to separate the duties, plaintiff here has met that burden.

it is the only duty from which they presently restrict those female guards whom they employ in contact positions in the all-male non-penitentiaries.[60/] (J.S. 43.)

The fact that women are so restricted now is evidence that it is plausible to separate this duty from the others. Moreover, the District Court found that "only a small percentage of the correctional counselor work force is involved in conducting systematic strip searches." (J.S. 45.) The four

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60/ Six of the sixteen guards at the all-male Frank Lee Youth Center are females. (J.S. 44.) The court found that "[t]he toilet and shower facilities at this institution are communal and open like those in the large penitentiaries. Duties of these women counselors include walking through the dormitories, making body counts during normal hours and after lights are out, making inspection rounds through the shower room area even during use, and, . . . participating in shakedowns that involve frisking and searching the bodies of inmates." *Id.* In any event, the decision below gives the defendants latitude to establish other "selective work responsibilities" in addition to the performance of strip searches. (J.S. 46.) For example, defendants could choose to prohibit female guards from conducting latrine inspections. This aspect of the job could be separated easily, since defendants testified that such inspections occur only "once a day." (A. 105.)

all-male penitentiaries, to which Regulation 204 applies, are Holman Prison, Kilby Corrections Facility, Fountain Correction Center, and Draper Correctional Center. (J.S. 21.) Defendant Locke testified that no systematic strip searches are conducted at either Holman or Kilby. (A. 102, 105.) At Fountain he estimated that only 5-7 guards out of a total of 18-20 perform systematic strip searches and at Draper only 4 out of 18-20.[61/] (A. 104.)

The feasibility of separating the sexual from the nonsexual duties of a prison guard is further established by plaintiff's expert testimony. Warden Nelson testified that the only job function not performed by his female guards is the conduct of strip searches and that "this has not presented a problem." (A. 184.) When asked, "From the standpoint of good prison administration, . . . is it . . . possible to restrict the duties of the women,

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61/ "Systematic" strip searches are those which are conducted every day on a regular basis. (A. 103.) "Periodic" strip searches take place only "once every ten days" on an average. *Id.*

as your situation with respect to strip searches, and still utilize women so they perform an effective function within the institution?" Mr. Nelson responded in the affirmative. (A. 219.)

Since the legitimate concern for inmate privacy can be alleviated by procedures short of denying women the job, the District Court was correct in refusing to apply the bfoq exception. The correctness of its decision finds further support in the testimony that "the presence of women contributes to the normalization of the prison environment which has an advantageous psychological effect upon the prisoners." (J.S. 44.) As the District Court found, a recent policy statement by the Federal Bureau of Prisons states: "The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. This integration of staff of both sexes into all institutions will promote this development."62/ *Id.*

62/ Federal Prison System, Policy Statement No. 3713.7, January 7, 1976.

CONCLUSION

For the reasons herein stated, the District Court's holding that both the height and weight requirements and Regulation 204 violated Title VII's prohibition against sex discrimination should be AFFIRMED, and the injunction against their enforcement should continue in force.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-422

E. C. DOTHARD, ET AL.,
APPELLANTS

VS.

BRENDA M. MIETH, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

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ARGUMENT

I. JURISDICTION OVER THIS APPEAL WAS PROPERLY NOTED BY THIS COURT.

Although this Court has already noted probable jurisdiction over this cause, the brief filed by AFL-CIO amicus curiae raises certain questions to which appellants deem it necessary to reply. Basically, amicus urges that since part of the order appealed enjoined a state statute upon the basis of a violation of Title VII rather than a constitutional violation the case should be appealed first to Fifth Circuit Court of Appeals. Their position treats as inconsequential the facts that a state regulation was also enjoined on *both* statutory and constitutional grounds, that substantial constitutional questions were presented by the plaintiff's complaint against both the state statute and regulation and that other areas of the same order pertaining to other parties were based solely on constitutional grounds.

This case began as a joint class action brought by two female representatives of two different classes each challenging different areas of Alabama law. The class represented by Brenda M. Mieth challenged the use of height and weight requirements for employment as an Alabama State Trooper. That requirement was established by statute and made more restrictive by administrative regulation. Mieth sought an injunction against its further use alleging that it violated constitutional safeguards under 42 U.S.C., §1983 (A. 13-14). As is evident from other briefs in this cause, the part of the order below pertaining to this claim was not appealed. It was, however, before the court when the determination to convene a three-judge court was made.

The claim which resulted in this appeal was proposed by Dianne K. Rawlinson in the same complaint with Mieth. That

claim sought injunctions against both a statutory height and weight minimum requirement for law enforcement officers and an administrative regulation of the Alabama Board of Corrections. Although Rawlinson alleged procedural compliance with requirements for suit under Title VII, she also urged that both the statute and regulation challenged, in addition to being violative of her statutory rights under Title VII were also constitutionally invalid under the fourteenth amendment (A. 13-14, 177). This alleged constitutional violation by the state statutes and regulations were all proposed in the complaint before the district court when the decision to convene a three-judge court was made. The substantiality of the constitutional questions presented is evidenced by the fact that the order pertaining to the state troopers was based entirely on constitutional grounds and that the administrative regulation of the Board of Corrections was found violative of both Title VII and the fourteenth amendment. Only the height and weight requirement for prison guards was enjoined on statutory grounds alone.

The propriety of this direct appeal is established if the three-judge court was properly convened initially. Under 28 U.S.C. §1253, a direct appeal lies to this Court from any action required to be heard by a three-judge court; and, under 28 U.S.C. §2281, a three-judge court must be convened to hear any application for enjoining a state statute or regulation on the basis of unconstitutionality. The route of appeal is not made to turn upon the final basis of the decision but rather upon the gravity of the allegations.

As this Court held in *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 80 (1960), the fact that an action contains challenges to a state statute on both constitutional and statutory grounds does not dispense with the necessity of a three-judge court. If the constitutional violations alleged in

the complaint are not obviously frivolous or insubstantial, then an appeal from the resulting order, regardless of the ultimate holding on those issues, lies to this Court. *Locomotive Engineers v. Chicago Rock Island & Pacific R. Co.*, 382 U.S. 423, 428 (1966). The Court further indicated in *Hagans v. Lavine*, 415 U.S. 528 (1974), the perferred practice when a complaint presents independent statutory and constitutional grounds for decision is to resolve the statutory claim, if possible, through a single judge before convening a three-judge court. In the case at bar, however, the court below was faced with constitutional challenges to all statutes and regulations involved. In such a case, for a single judge to proceed would propose the exact problem which the three-judge court sought to remedy. As stated in *Jacobsen*, supra:

> "Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a nonconstitutional ground of attack was also alleged, and this might well defeat the purpose of §2281." 362 U.S. at 80.

Under the above discussed principles, it is clear that the three-judge court was properly convened and that this Court properly noted jurisdiction over the appeal pursuant to 28 U.S.C. §1253. Both a statute and a regulation were striken down by the court

and both were challenged on Title VII and constitutional grounds. Amicus argues in brief that a determination of the Title VII claim would preempt any inquiry into the constitutional allegations thereby making them insubstantial. AFL-CIO Amicus Curiae Brief at 6. This argument ignores the procedural, evidentiary and standing differences in actions brought under either Title VII or the fourteenth amendment and is completely untenable. Furthermore, Title VII as it applies to the states is in fact an actuating statute of the fourteenth amendment via the enforcement provisions of that amendment. For this reason, it is not dissimilar to the posture of a case asserting a constitutional violation through a "statutory" vehicle such as 42 U.S.C. §1983. Therefore an equal employment claim asserting Title VII although being procedurally different from a fourteenth amendment claim presents closely related issues of proof. Completely separate determinations of each claim would be needlessly wasteful of judicial manhours.

It is completely inconsistent for amicus to assert on one hand that Title VII and the equal protection clause are so similar as to make the latter "superfluous", and at the same time contend that the two claims are of sufficient separate identity to classify one "statutory" and the other "constitutional". Equal employment under Title VII can certainly not be more "equal" than equal employment under the fourteenth amendment.

In a case such as the present where the "statutory" claim and constitutional claim are procedurally different, but very close in actual matters of factual proof, the court should not automatically assume that the constitutional claim is insubstantial not requiring a three-judge court. The two claims so proposed could not be adequately separated to produce any efficiency as was the aim of the dicta in *Hagans* cited by Amicus. Brief of AFL-CIO at 7. Certainly, any lack of efficiency in any event does not rise to the level of a jurisdictional defect.

For these reasons, appellants assert that the three-judge court below was properly convened at the outset and that the appeal presently prosecuted from its decision properly lies in the United States Supreme Court.

II. THE CONSTITUTIONALITY OF TITLE VII'S APPLICATION TO THE STATES SHOULD BE DECIDED BY THE COURT IN THIS CAUSE.

The appellees urge that the constitutionality of Title VII's 1972 amendments should not be reviewed in this case because it was not properly presented. Appellants admit that the constitutionality of these amendments was not specifically addressed until the briefs on the merits were filed in this cause. A permissible review of this question could certainly be justified by either a broad reading of the issues in the jurisdictional statement or by the plain error doctrine under this Court's rule 40(1)(d)(2). Appellants, however, contend that the question must be addressed as it pertains to subject matter jurisdiction.

The constitutionality of Title VII's application to the states is a crucial factor to the subject matter jurisdiction over the Title VII claims presented by the case at bar. Therefore, the position of appellants that the 1972 amendments constituted an unconstitutional extension of congressional power presents a question of a jurisdictional bar which should be decided by this Court. *See e.g. Edelman v. Jordan*, 415 U.S. 651, 677-678 (1974). Moreover, since the question of constitutionality here in fact determines subject matter jurisdiction over the cause, the fact that it was not succintly raised below or in the jurisdictional statement should not bar its present resolution. *See also Schlesinger v. Councilman*, 420 U.S. 728, 743 (1975); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975).

Furthermore, the issue has been briefed by both parties

and the Solicitor General has been notified of the challenge to the statute. In light of these facts, little reason upholds the view that the claim of unconstitutionality urged by appellants should not now be addressed by the Court.

III. THE APPLICATION TO THE STATES OF TITLE VII FROM THE 1972 AMENDMENT IS UNCONSTITUTIONAL.

Appellants readily admit the well-established power of Congress to regulate all aspects of interstate commerce even in the most incidental of areas. *See e.g. Fry v. United States*, 421 U.S. 542, 547 (1975). However, the 1972 amendments of Title VII include within their scope all state activities without requirement of even incidental effect on interstate commerce. For this reason, appellants contend that the complete state coverage under Title VII can only be based upon the congressional enforcement provisions under the fourteenth amendment.

In proposing this contention, we recognize that any sovereign interest of the states is in some cases necessarily limited by a balancing of interests as in eleventh amendment limitations established in *Fitzpatrick v. Blitzer*, ___ U.S. ___, 49 L. Ed. 2d 614 (1976). Nevertheless, our argument that Title VII is not "appropriate legislation" under the fourteenth amendment does not turn upon any offsetting specific interest of the state, but rather upon the inherent interest of state sovereignty itself. We do not contend that a congressional act must meet the same equal protection proscriptions under the fourteenth amendment as must a state act. This was the argument proposed in *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) which we urge is inapposite. Appellants *do*, however, contend that the appropriateness of enforcement legislation by Congress should not be given mere "rubber stamp" approval by a reviewing judicial body. *See e.g., United States v. Hampshire*, 45 L.W.

2087 (1st Cir., Aug. 5, 1976); *Usery v. Salt Lake City Board of Eucation*, 45 L.W. 2155 (D. Utah, Aug. 31, 1976).

Stellar examples of valid enforcement provisions which on their face seem violative of the equal protection clause itself are found in the preferences allowed under affirmative action programs. Flexibility such as this between the enforcement means and the ends sought, allows for "congressional resourcefulness". *Katzenbach, supra*, at 648. Nevertheless, as appellants urged in their original brief, such affirmative action preferences lend no support to Title VII under the fourteenth amendment. Appellant's Brief at 21. While the good intention of Title VII is not questioned, its 1972 postscript inclusion of *all* state activities cannot be justified on the same basis as is the original enactment nor on the enforcement provisions of the fourteenth amendment.

IV. ASSUMING ARGUENDO THAT TITLE VII IS VALID IN ITS APPLICATION TO THE STATES, THE HEIGHT AND WEIGHT MINIMUMS FOR LAW ENFORCEMENT OFFICERS IN ALABAMA ARE VALID.

As Appellants argued in their initial brief, this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is limited somewhat by its circumstances. Appellant's Brief at 39. For that reason, we contend that the statewide census figures offered by plaintiff's below to show discrimination, with no showing of impact on job applicants (or even persons in the job market), nor with any showing of past overt discrimination simply fails to present a prima facie discriminatory challenge to the Alabama statute. If no more were required than this, the court below might as well take judicial knowledge of this "discrimination". Moreover, it is hard to understand appellee's argument that the height and weight requirements dissuaded many persons from even applying due to their simple determin-

ation. Obviously, these requirements were not of common knowledge even to persons with law enforcement experience and college training such as plaintiff Rawlinson. Certainly some showing of their effect on applicants should have been required before shifting the burden to the state. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Nevertheless, the safety and efficiency requirements under the business necessity test uphold any burden placed upon the state to defend the size requirements. The very nature of the job of a law enforcement officer and the inherent risks to the officer and those under his/her protection justify a greater deference to the employer's judgment on employee requirements. In reviewing a height requirement for airline pilots, a Missouri district court recently stated:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, any pre-employment standard that discriminates against minorities should be closely examined. In such a case, the employer should face a heavy burden to demonstrate that his criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden." *Boyd v. Ozark Air Lines, Inc.*, 45 L.W. 2135 (E. Mo., Aug. 23, 1976).

See also, Condit v. United Air Lines, Inc., 45 L.W. 2176 (E. Va., Sept. 3, 1976).

Appellants urge that the considerations of human risk involved support the Alabama legislature's conclusion that the benefits derived from sheer size are necessary enough to require

a minimum. Appellants certainly urge that the record, proper deference to legislative judgment, the nature of the job involved and matters of common experience uphold the validity of the height and weight minimums in the Alabama statute.

V. ASSUMING ARGUENDO THAT TITLE VII IS VALID IN ITS APPLICATION TO THE STATES, THE REGULATION REQUIREMENT THAT CONTACT POSITIONS IN THE ALABAMA PENITENTIARIES BE FILLED BY GUARDS OF LIKE SEX WITH THE INMATES IS VALID.

A casual reading of Regulation 204 reveals that the guard/employee's sex is a factor in assigning guards to contact positions within penitentiaries. It is not the only factor however, since the sex of inmates to be guarded must also be considered. Appellees contend that the elemental factor of the guard's sex in the decision for assignment makes this a case of explicit sex discrimination bringing into play the defense of a bona fide occupational qualification. We contend such is not the case and that the facts present only a case of disproportionate impact requiring a showing of business necessity. Appellant's Brief at 48.

Nevertheless, if this Court should require that a bona fide occupational qualification be shown to uphold Regulation 204, Appellants urge that appellees' interpretation is much too narrow. No doubt the BFOQ should not be interpreted as an exception which swallows the rule. However, the legislative history of its promulgation in no way supports appellees' position of only an imaginary existence. The exception was obviously enacted in the common sense recognition of our society's interaction but also in an attempt to prevent the future sustanance of unbased distinctions on the basis of sex. The examples of the all-male baseball team and female nurse for female

invalid cited by the appellee from the floor debates over the BFOQ, show considerably less demonstratively objective reasons for sex discrimination than does Regulation 204. Quite probably even those examples would likely fail to meet the EEOC guidelines for a BFOQ.

The use of Regulation 204 by the Alabama Board of Corrections was a common sense recognition of real factors with which they are forced to deal. Commissioner Locke's testimony recognized that sexual sterotypes do exist among the Alabama inmates. This recognition was not in furtherance of these perceptions but only that they do exist and therefore must be dealt with. Naturally, a penitentiary setting places a premium on control, security and safety. These goals require a realistic approach to human interactions and the perceptions of the inmates whether they be logically based or not. The Board's promulgation of Regulation 204 attempts to strike a balance between the rights of the employees and the goals they must achieve by recognizing that disruptive influences, degrees in the invasion of privacy, and perceptions of weaknesses do not *in fact* fall equally along sexual lines in penitentiaries.

The plaintiffs below offered no showing of any *penitentiary* setting where women were used in contact positions with male inmates, nor testimony of any expert who had supervised such a setting. Mr. Nelson's testimony offered by appellees show that he has supervised women in contact positions in a *non-penitentiary* institution for six months although the penitentiaries in that system do not use women in such positions. Alabama has used women in such institutions since 1974 (A. 289, 252). The Alabama position was found inconsistent by the court below. Appellants here urge this Court to recognize the differences in the institutions which justify the restrictions in penitentiaries which are not required in lower security/custody institutions. These factual differences justify any required showing of a BFOQ for Regulation 204.

CONCLUSION

Wherefore, based upon the above-cited authorities and reasons, the appellants urge that the finding and verdict of the Middle District of Alabama be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter S. Turner, Assistant Attorney General of Alabama, one of the attorneys for appellants, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 15th day of April, 1977, I served the requisite number of copies of the foregoing Reply Brief of Appellants upon the attorneys for the appellee, by mailing the same to them, first-class postage prepaid, and addressed to them as follows:

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I further certify that I also this date served in the same fashion the Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, pursuant to Rule 33(2)(b) and all amicus parties.

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No. 76-422

In the Supreme Court of the United States

OCTOBER TERM, 1976

E. C. DOTHARD, ET AL., APPELLANTS

v.

BRENDA M. MIETH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-422

E. C. DOTHARD, ET AL., APPELLANTS
v.
BRENDA M. MIETH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether minimum height and weight requirements for employment as State prison guards that disqualify approximately 40 percent of women but less than 1 percent of men and that are not shown to be job related violate Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment.

2. Whether a State regulation that excludes women from employment as prison guards in all-male penitentiaries violates Title VII.

INTEREST OF THE UNITED STATES

The United States is charged with responsibility for enforcement of equal employment opportunity rights under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.* In particular, the Attorney General has authority under Sections 706(f) and 707 of the Act, 42 U.S.C. (and Supp. V) 2000e–5(f) and 2000e–6, to bring civil actions against State and local governments and governmental agencies that have allegedly engaged in unlawful employment practices. Pursuant to that responsibility, the United States has initiated litigation in several cases challenging the legality of minimum height and weight requirements for employment in law enforcement positions.[1]

A decision regarding the legality of height and weight requirements for prison guards will also affect the enforcement responsibilities of the Law Enforcement Assistance Administration (LEAA), which has responsibility "to assist State and local governments in strengthening and improving law enforcement and criminal justice * * *" (42 U.S.C. (Supp. V) 3701) under Title I of the Omnibus Crime Control and Safe

[1] See, *e.g.*, *United States* v. *State of North Carolina, et al.*, C.A. No. 75–0328–Civ. 5 (E.D. N.C.) (state troopers); *United States* v. *City of Philadelphia, et al.*, C.A. No. 74–400 (E.D. Pa.) (police); *United States* v. *City of Los Angeles*, C.A. No. 72–1806 (C.D. Calif.) (fire); *United States* v. *City of Chicago, et al.*, C.A. No. 73C–2080 (N.D. Ill.) (police); *United States* v. *City of Buffalo, et al.*, C.A. No. 1973–414 (W.D. N.Y.) (fire and police); *United States* v. *Jefferson County, Alabama, et al.*, C.A. No. 75–P–06665 (N.D. Ala.) (county and city law enforcement officers).

Streets Act of 1968, as amended, 87 Stat. 197, 42 U.S.C. 3701 (and Supp. V) *et seq.* In making grants to State and local governments under the provisions of that Act, the LEAA is responsible for assuring that (Section 518(c)(1), 42 U.S.C. (Supp. V) 3766):

> [n]o person in any state [is] on the ground of * * * sex * * * excluded from participation in, * * * denied the benefits of, or * * * subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the Act].

Pursuant to its responsibilities, LEAA has promulgated regulations which provide as follows (28 C.F.R. 42.203(d), 42 Fed. Reg. 9497–9498 (1977)):

> The use of a minimum height or weight requirement which operates to disproportionately exclude women and persons of certain national origins * * * is a violation of this subpart, unless the recipient is able to demonstrate convincingly, through use of supportive factual data that the requirement has been validated * * *.[2]

STATEMENT

Dianne K. Rawlinson, a 22-year-old woman whose height was 5'3" and weight was 115 pounds applied in September 1974 for a position as Correctional Coun-

[2] The standard for validation is found in 28 C.F.R. Part 50, the Department of Justice Guidelines on Employee Selection, 41 Fed. Reg. 51735–51743 (1976). The nondiscrimination provision of the Act may be enforced, *inter alia*, through termination of funding after an administrative hearing (42 U.S.C. (Supp. V) 3757) and by the Attorney General's institution of a civil action when he has reason to believe that a pattern or practice in violation of that provision is occurring (42 U.S.C. (Supp. V) 3766(c)(3)).

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selor trainee with the Alabama Personnel Board (J. S. 5).[3] The Personnel Board refused Ms. Rawlinson employment solely because she failed to meet the minimum weight requirements of Alabama Code, Title 55, § 373(109) (1973 Supp.) (J.S. 5; A. 174–175).[4] That section establishes a statutory weight minimum of 120 pounds and a height minimum of five feet two inches for employment as a state law enforcement officer.

After receiving her letter of rejection, Ms. Rawlinson filed a charge with the Equal Employment Opportunity Commission in Birmingham, Alabama, challenging the minimum height and weight requirements as sexually discriminatory and received a right to sue letter from the Commission (J. S. App. 30–31). On December 8, 1975, she filed a complaint in the United States District Court for the Middle District of Alabama on behalf of herself and other similarly situated women, challenging the height and weight minimums as violative of Title VII and the Fourteenth Amendment to the Constitution, and a three-judge court was convened (A. 7–22; J.S. App. 17). During the pendency of the suit, the Alabama Board of Corrections promulgated Administrative Regulation 204, which allows for selective certification of positions requiring personal contact with inmates

[3] Descriptions of the position of Correctional Counselor Trainee and that of Correctional Counselor I appear at A. 29–32.

[4] Alabama personnel officials did not inform Ms. Rawlinson of the possibility that a waiver of the weight requirement could be sought (J.S. App. 29–30).

("contact positions") as restricted to employees of one sex in institutions in which the inmates are of only one sex (A. 95–97, 176–177).[5] In an amended class action complaint, filed on March 4, 1976, Ms. Rawlinson challenged Regulation 204 as violative of 42 U.S.C. 1983, Title VII, and the Fourteenth Amendment (A. 95–97, 176–77).

At trial, appellees introduced evidence showing that the combined effect of the State's 5′2″ and 120 pounds minimum height and weight requirements is to exclude 41.13 percent of women between the ages of 18–79 while excluding less than one percent of men in the same age group (J.S. App. 32). The district court held that this showing established a *prima facie* case of sex discrimination under Title VII, and shifted the burden to the State to show that the height and weight requirements are job related. See *Griggs* v.

[5] Regulation 204 (App. 36–38) requires correctional institutions to identify the Correctional Counselor positions which they feel require selective certification as male or female positions and to request in writing that the positions be so designated. The criteria to be utilized in establishing the need for selective certification are as follows:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require searching inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

Duke Power Co., 401 U.S. 424. The state offered witnesses who testified that the prison guard duties required a minimal level of strength and that height and weight are generally related to strength (J.S. App. 40). Two witnesses for appellees testified that "height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor" (J.S. App. 40). The court concluded (J.S. App. 41):

> If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength. The crude rule of thumb provided by height and weight levels impermissibly restricts qualified individuals without giving them an opportunity to demonstrate their merit.[8]

The court enjoined the appellant State officials from denying Ms. Rawlinson, and the class she represents, employment as Correctional Counselors solely on the basis of their failure to meet minimum height and weight requirements (J.S. App. 50).

The district court also enjoined State officials from enforcing Administrative Regulation 204 (J. S. App. 50). Appellees had introduced evidence showing that

[8] The court found that, although a valid waiver provision might save the statute, the State did not inform applicants of the right to request a waiver and the procedures for administering waiver requests did not comport with fundamental fairness (J.S. App. 42). The court concluded that the minimum height and weight requirements violated Title VII (J.S. App. 42). It is not clear whether the district court also considered the restrictions violative of the Equal Protection Clause. See J.S. App. 39–40.

as a result of selective certification, women are excluded from all but a few positions in the four major institutions that employ more than 75 percent of the state's correctional counselors (see Table at J. S. App. 26). Appellants did not deny that the regulation discriminates on the basis of sex, but sought to justify it as a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *" (Section 703(e) of the Act, 42 U.S.C. 2000e–2(e)). Specifically, appellants claimed that women could not adequately and safely perform the duties of a correctional counselor in an all-male penitentiary and that their presence would compromise the privacy rights of inmates (J. S. App. 43). However, on the basis of evidence showing that Alabama employed women in contact positions at other all-male correctional institutions (J. S. App. 43), that the presence of women contributes to the normalization of the prison environment (J. S. App. 44), and that only a small percentage of the correctional counselor's work force is involved in activity implicating prisoners' privacy rights (J. S. App. 45), the district court concluded that appellants had not demonstrated that gender was a bona fide requirement—especially because "procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job" (J. S. App. 45). The court accordingly held that "Regulation 204, insofar as it denies women jobs as prison guards in all-male pris-

ons, is violative of Title VII and the Equal Protection Clause" (J. S. App. 45).

SUMMARY OF ARGUMENT

Appellants' challenge to the constitutionality of Title VII as applied to the States is not properly before the Court. These issues were never certified to the Attorney General pursuant to 28 U.S.C. 2403, were neither raised before, nor considered by, the court below, and they should not now be considered by this Court. Consideration of appellants' constitutional claims is also precluded by their failure to assert those claims in their Jurisdictional Statement.

The three-judge district court properly held that appellants' minimum height and weight requirements for correctional counselors, which eliminate more than 40 percent of potential female applicants and less than one percent of males (J.S. App. 32, 35), violate Title VII. This disproportionate exclusion of women triggers the Title VII requirement of demonstrating that the standards have a "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432. Under Title VII, the discriminatory effect of a challenged practice, without regard to any past or present intentional discrimination, requires that the practice be validated in terms of job performance. *General Electric Co.* v. *Gilbert,* Nos. 74–1589 and 74–1590, decided December 7, 1976, slip op. 10–11; *Washington* v. *Davis,* 426 U.S. 229; Equal Employment Opportunity Council Guidelines, 41 Fed.

Reg. 51736. These standards of Title VII enforcement apply equally to private and governmental defendants. See H.R. Rep. No. 92–238, 92d Cong., 1st Sess., p. 17 (1971).

The district court properly concluded that the appellants had not demonstrated that the height and weight standards were supported by "business necessity." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431. Appellants' witnesses testified that the standards were generally related to strength, and that strength was "an extremely desirable requirement" for a correctional counselor (A. 113–114). Appellees' expert witnesses testified that "height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor" (J.S. App. 40). At any rate, appellants were unable to identify the source of the particular standards or to demonstrate that the particular heights and weights chosen correlate to any defined minimum strength requirement. These arbitrarily set standards were shown to be based only on vague generalities and assumptions and are not "demonstrably a reasonable measure of job performance." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436. Because these standards were not in any fashion validated and "impermissibly restrict[ed] qualified individuals without giving them an opportunity to demonstrate their merit" (J.S. App. 41), they violate Title VII.

Although Administrative Regulation 204 authorizes certification of job positions as either male or female, it is applied to exclude women from employment in

nearly 75 percent of correctional counselor positions. Cf. *Shelley* v. *Kraemer,* 33 U.S. 1, 22. Because it operates as a sex-based classification, it violates Title VII in the absence of a showing that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [the job]" (Section 703 (e)(1), 42 U.S.C. 2000e–2(e)(1)). The district court properly applied the "bfoq" exception to require a factual basis for the exclusion of women rather than the mere invocation or stereotyped characteristics. See Equal Employment Opportunity Guidelines On Discrimination Because Of Sex, 29 C.F.R. 1604.2(a); *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 235 (C.A. 5).

The record before the district court demonstrated that women can perform safely and effectively in male facilities, and were employed by appellees as correctional counselors in contact positions in other all-male state institutions. Appellants introduced no data indicating any physical reason why female correctional counselors could not perform their duties, but rather rested upon paternalistic fears for female safety and speculation concerning prisoner reaction that was based in part upon sexual stereotypes. The district court was entitled to conclude on the basis of the evidence before it that appellants had not met their burden of demonstrating that being male was a bona fide necessary qualification for the job. Similarly, on the basis of evidence indicating the low incidence of "strip search" duties, the court properly concluded that the privacy rights of male inmates could be protected by selective work responsibilities "short of

denying women the job" (J. S. App. 45). Cf. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425.

ARGUMENT

I. APPELLANTS' CLAIM THAT TITLE VII IS UNCONSTITUTIONAL AS APPLIED TO STATE AND LOCAL GOVERNMENTS IS NOT PROPERLY BEFORE THIS COURT

Appellants argue that the extension of the coverage of Title VII in 1972 to include State and local governments is beyond Congress' powers under the Commerce Clause, Article I, Section 8, cl. 3, and under Section 5 of the Fourteenth Amendment, and further, that this extended coverage infringes upon rights reserved to the people and to the states by the Ninth and Tenth Amendments. Appellants acknowledge (Br. 2) that no court of the United States has certified to the Attorney General that the constitutionality of Title VII has been drawn into question. See 28 U.S.C. 2403. The reason is obvious; appellants did not present these constitutional claims to the court below. This Court ordinarily will not consider issues neither raised before, nor considered by, the court below, *Duigan* v. *United States,* 274 U.S. 195, 200; *Husty* v. *United States,* 282 U.S. 694, 701–702; *Lawn* v. *United States,* 355 U.S. 339, 362–363 n. 16; *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147 n. 2. There is no reason to depart from this salutary rule in this case, where appellants have provided no reason why they should be permitted to challenge the constitutionality of important legislation implementing the Fourteenth

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Amendment in a case where no certification was made to the Attorney General under 28 U.S.C. 2403.

Moreover, no constitutional challenge to Title VII is stated or fairly comprised in the questions presented in appellants' Jurisdictional Statement filed with this Court. Rule 15(1)(c) of this Court provides, in relevant part:

> The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.[7]

This Court has specifically disapproved of the practice of raising additional questions in the brief on the merits, *Irvine* v. *California,* 347 U.S. 128, 129, and has repeatedly refused to consider such questions when so raised, *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 179; *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376; *J. I. Case Co.* v. *Borak,* 377 U.S. 426.

Since the question of the constitutionality of Title VII is not properly presented, this Court should not consider points I, II, or III of Appellants' brief (Br. 16–38).[8]

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[7] See also Rules 23(1)(c) and 40(1)(d)(2).

[8] If the Court should determine, nonetheless, to reach appellants' constitutional claims, our views concerning the power of Congress to extend Title VII to state and local governments are discussed in the Brief for the United States in No. 76-255, *Hazelwood School District, et al.* v. *United States,* pending for argument in April, 1977. A copy of that brief is being served on counsel for appellants.

II. THE MINIMUM HEIGHT AND WEIGHT REQUIREMENTS VIOLATE TITLE VII SINCE THEY DISQUALIFY A SUBSTANTIALLY DISPROPORTIONATE NUMBER OF WOMEN AND WERE NOT SHOWN TO BE JOB RELATED[9]

A. TITLE VII REQUIRES THAT AN EMPLOYMENT PRACTICE THAT HAS A SEX-BASED DISPARATE EFFECT BE JUSTIFIED BY A MANIFEST RELATIONSHIP TO THE JOB

In enacting Title VII, Congress established a broad prohibition against employment practices that constitute "artificial, arbitrary, and unnecessary barriers to employment" on the basis of "impermissible classification[s]", including race, religion, sex, or national origin. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431. Section 703(a) of the Act, which makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * because of an individual's * * * sex," prohibits employment practices that disparately treat women and men. See *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542.

Appellants contend (Br. 39–41) that a *prima facie* case of discrimination under Title VII can be shown only where the disparate impact of an employer's practice occurs in the context of a history of past discrimination and that no such history of invidious discrimination by the employer was shown here.[10]

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[9] Since the district court's decision with respect to both the height and weight minimums and Administrative Regulation 204 can be upheld on the statutory ground, there is no need for the court to reach the constitutional issue. See, *e.g.*, *Lau* v. *Nichols,* 414 U.S. 563, 566.

[10] Appellants, however, maintain a system of job assignments for Correctional Counselors that is explicitly sex-based and that

That narrow view of the statute is unwarranted. In *Griggs, supra,* this Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (401 U.S. at 431), and emphasized that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (*id.* at 432; emphasis in original).[11] In adopting the 1972 amendments extending Title VII to the States, Congress cited *Griggs* and indicated approval of the interpretation of discrimination in Title VII "in terms of 'systems' and 'effects' rather than simply intentional wrongs," S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 5 (1971); H.R. Rep. No. 92–238, 92d Cong., 1st Sess., p. 8 (1971). See, also, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405; *Gregory* v. *Litton Systems Inc.,* 472 F.2d 631, 632 (C.A. 9); *Wallace* v. *Debron Corp.,* 494 F.2d 674, 676 (C.A. 8). As the Court recently stated in *General Electric Co.* v. *Gilbert,* Nos. 74–1589

excludes women from all but a few positions in the institutions that employ approximately 75 percent of the State's correctional personnel (see discussion *supra*, pp. 6–7). And appellants are certainly aware that the height and weight standard has a substantial relationship to sex. There is thus an element of purposeful exclusion of the protected class involved here.

[11] The courts of appeals have repeatedly held the rationale of *Griggs* to be applicable beyond the context of testing. See, *e.g.*, *Davis* v. *County of Los Angeles*, 13 F.E.P. Cases 1217 (C.A. 9); *Local 53 of Int. Ass'n. of Heat & Frost I. & A. Wkrs.* v. *Vogler*, 407 F. 2d 1047 (C.A. 5); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (C.A. 8); *Green* v. *Missouri Pacific Railroad Co.*, 523 F.2d 1290 (C.A. 8); *Wallace* v. *Debron Corp.*, 494 F.2d 674 (C.A. 8); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (C.A. 9).

and 74–1590, decided December 7, 1976, slip op. 10–11 (emphasis in original):[12]

> [O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another.

In *Washington* v. *Davis,* 426 U.S. 229, this Court discussed the difference in standards between an action challenging employment practices under the Fourteenth Amendment and a similar challenge under Title VII. The Court there recognized that (426 U.S. at 246–247):

> [U]nder Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways * * *. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.

[12] In *Gilbert*, the Court found that plaintiffs had failed to show that there was a gender-based discriminatory effect in the operation of General Electric's benefit plan.

Finally, the Equal Employment Opportunity Coordinating Council,[13] which is charged by Title VII (Section 715, 42 U.S.C. (Supp. V) 2000e–14) with the responsibility, *inter alia,* for developing policies to maximize effort, promote efficiency and eliminate inconsistency among the operations of the agencies and departments responsible for enforcement of federal equal employment opportunity law, has promulgated a set of guidelines for employee selection procedures (41 Fed. Reg. 51734 *et seq.* (1976)).[14] The guidelines provide that (41 Fed. Reg. 51736, 51744, 51752 (1976)):

> [t]he use of any selection procedure which has an adverse impact on the members of any racial, ethnic or sex group with respect to any employment decision will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure is validated * * *.

This administrative interpretation of Title VII by the enforcing agencies merits deference by the courts, especially where the legislative history of the statute supports the agencies' construction. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 434; *Trafficante* v. *Metro-*

[13] The Council is composed of the Department of Labor, the Equal Employment Opportunity Commission (EEOC), the Civil Rights Commission, the Civil Service Commission, and the Department of Justice.

[14] The guidelines were adopted only by the Departments of Labor and Justice and the Civil Service Commission. The EEOC has determined that the guidelines do not represent the views of that agency. However, that agency's existing guidelines also define discrimination under Title VII in terms of the adverse effect of employee selection procedures, 29 C.F.R. 1607.3.

politan Life Insurance Co., 409 U.S. 205, 210; *Lau* v. *Nichols,* 414 U.S. 563, 571.[15] A showing that minimum height and weight requirements operate as a sex-based classification, by disproportionately excluding women, triggers the Title VII requirement that appellants demonstrate their "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.

B. APPELLEES DEMONSTRATED A DISPARATE IMPACT THAT WAS NOT SHOWN TO BE JUSTIFIED BY BUSINESS NECESSITY

In this case, the three-judge court found that plaintiffs have proved a *prima facie* case of discrimination on account of sex by virtue of the fact that the minimum height and weight requirements for Correctional Counselor positions eliminated more than 40 percent of the potential female applicants while excluding less than one percent of males.[16] This showing shifted to

[15] The guidelines are intended to apply, as well, to other federal laws concerning equal employment opportunity, including Executive Order 11246 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303. They are utilized also by LEAA in fulfilling its enforcement responsibilities under 42 U.S.C. (Supp. V) 3766 (see discussion *supra*, pp. 2–3). These guidelines are consistent with the intent of Congress in enacting Title VII, are the product of thorough and careful deliberations of the agencies charged with administration of federal equal employment opportunity legislation, and are not inconsistent with prior pronouncements by these federal agencies. Cf. *General Electric Co.* v. *Gilbert*, *supra*, slip op. 16–19.

[16] Although appellants complain that the statistics in evidence do not represent the pool of applicants (Br. 41–42), we agree with appellees that, where interested persons can readily determine whether they meet an objective criterion of employment, many potential applicants may be discouraged from applying (Brief for the Appellees, pp. 34–35). Under such circumstances, the pool of potential applicants provides the only appropriate base for comparison.

the appellants the burden of demonstrating that these employment requirements have a "manifest relationship" to the job of correctional counselor. *Griggs* v. *Duke Power Co., supra.* The district court found that appellants failed to sustain that burden.[17]

Judson Locke, Commissioner of the Board of Corrections, testified in support of the height and weight minimums that, in his view, physical strength is "an extremely desirable requirement" for the correctional counselor because of the potential need to subdue an inmate (A. 113–114). By contrast, testimony of two experts in the correctional field indicated that "height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor" (J.S. App. 40; see A. 191–192, testimony of William R. Nelson and A. 80–83, testimony of C. Robert Sarver).[18] Even strength *per se* is not a necessary requirement since, as both experts agreed, a correctional counselor should not attempt to deal with a confrontation single-handed. "It would be preposterous to proceed alone * * *" (A. 82). "The officer would summon help as quickly as possible * * *" (A. 190). As one expert witness stated (A. 81–82):

> There would be no way, no matter how large or how strong or how heavy or how tall he is, no way in the world he could ever protect himself if they wanted to get him. It wouldn't matter what his sex was.

Even if strength were a valid job requirement, appellants never demonstrated anything more than a speculative relationship between strength and the minimum height and weight requirements chosen. Appellants admit that the statutory requirements are not based upon any scientific validation study (Br. 45).[19] Their basis is mere assumptions that height and weight are related to strength (A. 114–116) and that the particular minimum heights and weights chosen correlate with a totally undefined strength requirement. Reviewing the testimony of the one witness upon whom appellants relied, the district court said (J.S. App. 40):

> Commissioner Locke's sole contention concerning the job relatedness of these physical requirements was that they were related to strength. Undeniably, body height and weight have some relationship to strength, but we are

[17] The court also had under consideration a height and weight standard for employment of State Troopers that required potential applicants to be at least 5'9" tall and weigh at least 160 pounds in order to qualify for those positions (J.S. App. 18). The court found that the 5'9", 160-pound standard virtually eliminated women from consideration (only 0.68% of women would have met that standard) (J.S. App. 31). While the height and weight minimums for correctional counselors do not result in as great a degree of exclusion, the disparate effect is within the range that this Court has found significant in other cases. *E.g., Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430 n. 6; *Castaneda* v. *Partida*, No. 75–1552, decided March 23, 1977, slip op. 13.

[18] Mr. Nelson is the Warden of the Metropolitan Correctional Center in Chicago, Illinois, a federal maximum security facility. He had, at the time of his testimony, more than twenty years' experience in the correctional field (A. 178–179). Mr. Sarver is the former Commissioner of the Arkansas Department of Corrections (1968–1971) and was Director of the West Virginia Department of Corrections from 1966–1968 (A. 73).

[19] Validation of a standard such as that at issue here does not require proof to a mathematical certainty as asserted by appellants (Br. 45–46). It does, however, require the use of "supportive factual data" to show that the standard has a factual relationship to the job in question. See LEAA Regulations, *supra.*

> unconvinced that a person below an arbitrarily defined level would invariably lack the necessary strength to perform the required tasks.

The Executive Director of the Alabama Peace Officers Standards and Training Commission, Mr. James Jackson, could not say how the standards were established. He stated (A. 164): "I don't know where they obtained, or whether it was copied from someone else, or what, I don't know." Although the Commission has the power to obtain the services and advice of experts in the field of law enforcement to aid it in adopting standards for employment, it has not done so (A. 165). Nothing in Title VII prohibits the State from establishing a strength requirement, if in fact strength is necessary to the employees' duties. However, as the district court stated: "If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength" (J.S. App. 41). By contrast the test used by appellants "impermissibly restricts qualified individuals without giving them an opportunity to demonstrate their merit" (*ibid.*).

When an employment standard has a substantially disproportionate adverse effect upon a class protected by the statute, Title VII requires the employer to show that the standard is "demonstrably a reasonable measure of job performance" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436) an employer may not rely upon vague generalities or assumptions. "If an employment practice which operates to exclude Negroes [or other classes protected by Title VII] can-

not be shown to be related to job performance, the practice is prohibited" (*id.* at 431). What this Court stated in *Griggs* in regard to general intelligence tests is equally applicable to arbitrarily chosen physical requirements such as those at issue here. "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract" (*id.* at 436).

The minimum height and weight requirements here were arbitrarily set. Appellants admit that they cannot be sure that a person who meets these minimums (5′2″, 120 pounds) can always perform the duties of a prison guard, or that a person who falls below the minimum inevitably will not be able to perform (Br. 45). Indeed, the minimums are nothing more than a "crude rule of thumb" (J.S. App. 41). The court below correctly found that these standards for employment were not shown to be necessary for successful job performance—*i.e.*, were not shown to be a business necessity—and are prohibited by Title VII.

Finally, appellants argue that because these employment standards were promulgated by the State legislature, they are entitled to greater deference than standards established by a private employer.[20] Indeed, they argue that the plaintiff should be required to show affirmatively that the standard established by the legislature is not a business necessity

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[20] To the extent that appellants' argument is based upon the Tenth Amendment to the Constitution, it is not properly before this Court for the reasons stated *supra*, pp. 11–12.

(Br. 42–43, 45).[21] By contrast, the legislative history of the 1972 amendments extending Title VII to the states as employers indicated Congress' concern for widespread discrimination in employment by state and local governments and its intention that the same Title VII principles extend to governmental and private employers alike. See H.R. Rep. No. 92–238, *supra,* at 17; S. Rep. 92–415, *supra,* at 10. Nothing in the legislative history of the 1972 amendments suggests that Congress altered the burden of proof in an employment discrimination case where a state statute is challenged. Instead, the Section-by-Section Analysis of the 1972 Act, presented to the House and the Senate at the time the Conference Report was submitted to each body (118 Cong. Rec. 7166–7169, 7563–7567 (1972)) states (*id.* at 7166, 7564):

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

The court below properly placed on appellants the burden of demonstrating that the height and weight minimums bear a manifest relationship to perform-

[21] The burden of proof is properly upon the employer to show the business necessity for its practices (*Griggs*, *supra*, 401 U.S. at 432) since it is in the best position to know what the requirements of its business are and how they can best be achieved. These considerations are equally applicable to both public and private employers.

ance of the job of Correctional Counselor, and correctly held that appellants failed to meet that burden.[22]

III. REGULATION 204, WHICH ALLOWS FOR SELECTIVE CERTIFICATION OF CORRECTIONAL COUNSELORS BY SEX, VIOLATES TITLE VII

Initially, appellants contend that Regulation 204 is a neutral policy not based upon sex because, while it is applied to prohibit women from employment in contact positions in all-male penitentiaries, it may also be applied to prohibit men from working in similar positions in the female penitentiary. This Court has rejected similar arguments in the context of Fourteenth Amendment rights because of the individual and personal nature of the rights created thereby. "[E]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334, U.S. 1, 22. Since employment in the positions subject to Regulation 204 is based entirely upon the sex of the employee and "Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional

[22] The waiver provision of the statute, as administered by appellants, did not cure the discrimination caused by the height and weight minimums. The district court found that Ms. Rawlinson was not informed of the possibility that she could request a waiver or that the Board of Corrections could request one on her behalf (see A. 173–175), that the Board of Corrections has no standard procedure for informing applicants of their right to seek a waiver and has never exercised its power to request one, and that the administrative procedure for obtaining a waiver is, in any event, "remarkably informal and subjective" (J.S. App. 41, 42) and does not comport with fundamental fairness.

counselors in contact positions in all-male penitentiaries has been implemented" (J.S. App. 25),[23] the court below properly concluded that the Regulation would violate Title VII in the absence of a showing that sex is a "bona fide occupational qualification reasonably necessary to the normal operation" of the job of correctional counselor.

A. THE EXCEPTION FOR BONA FIDE OCCUPATIONAL QUALIFICATIONS SHOULD BE NARROWLY INTERPRETED TO IMPLEMENT THE ENFORCEMENT GOALS OF TITLE VII

Section 703(e)(1) of Title VII, 42 U.S.C. 2000e–2(e)(1), provides that, notwithstanding the Act's general prohibition of discrimination in employment on the basis of sex, it is not unlawful for an employer to hire and employ individuals on the basis of sex "where * * * sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of [the employer's] business or enterprise * * *." The legislative history of the Act indicates that this provision created a "limited exception"[24] to the general prohibition. Like other such exceptions to remedial statutes, it should be narrowly construed to further

[23] Although the Regulation does affect male Correctional Counselors, the Commissioner of the Board of Corrections testified as follows (A. 128): "Well, I thought that it was clear from the outset that me, my particular policy, and with the support of the Board, * * * that we do not intend to employ females to work in contact positions in all-male institutions."

[24] 110 Cong. Rec. 7213 (1964) (interpretative memorandum of Senators Clark and Case, floor managers of the bill). See also H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

the important public policy of Title VII. See *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493; *Phillips* v. *Martin Marietta Corp., supra*, 400 U.S. at 544–547 (Marshall, J, concurring).

Accordingly, the Equal Employment Opportunity Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604, state:

> The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other. [29 C.F.R 1604.2(a).]

The Guidelines specifically note that a "bfoq" exception is not warranted if the refusal to hire an individual is based upon stereotyped characteristics of the sexes. 29 C.F.R. 1604.2(a)(ii).[25]

This administrative interpretation of the "bfoq" exception has been accepted by the courts of appeals that have considered the issue as consistent with the broad remedial purpose of the Act.[26] For example, in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228, 235 (C.A. 5), the court of appeals con-

[25] The Guidelines recognize that (29 C.F.R. 1604.2(a)(2)):

"Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g.*, an actor or actress."

[26] See, *e.g.*, *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (C.A. 5); *Rosenfeld* v. *Southern Pacific Co.*, 416 F.2d 711 (C.A. 7); *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (C.A. 5), certiorari denied, 404 U.S. 950.

cluded that, in order to rely upon the "bfoq" exception, an employer must show that he has "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." An employer cannot assume, on the basis of stereotyped characterizations of women, that no women can perform a particular job, while treating all men as though they can. *Id.* at 235–236. Any other analysis would deny "desirable positions to a great many women perfectly capable of performing the duties involved" (408 F. 2d at 236). See also *Rosenfeld* v. *Southern Pacific Co., supra,* 444 F. 2d at 1224–1225; *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 717.

B. APPELLANTS DID NOT DEMONSTRATE THAT WOMEN AS A CLASS COULD NOT PERFORM SAFELY AND EFFICIENTLY

Appellants attempted to justify the exclusion of women from contact positions in the all-male maximum security institutions under two theories: first, that "women would not be able to perform adequately and safely within the setting of an all-male penitentiary" (J. S. App. 43), and second, that the male prisoners' right to privacy would be violated by having female correctional counselors in contact positions (*ibid.*). Applying the principles of the Equal Employment Opportunity Guidelines, and the cases cited *supra,* the court correctly held that appellants failed to carry their burden of establishing that they came within the "bfoq" exception.

Appellants' attempt to justify the exclusion of women from contact positions in all-male penitentiaries was based, in substantial part, upon stereotyped characteristics of the sexes, contrary to Congress' intent and the Equal Employment Opportunity Commission's Guidelines, and, to the extent it was based on other considerations, the district court was warranted in crediting the weighty countervailing evidence on this issue introduced by the complainants and rejecting appellants' defense.

The Commissioner of the Board of Corrections, Judson Locke, testified, in deposition, that the decision whether to employ women as guards was based in part upon the Southern attitude regarding the roles of males and females (A. 111–112), that another important consideration was the psychological built-in distinction between the way an inmate views a female as opposed to a male guard (A. 117–118), and that if a woman guard were taken hostage, the situation would necessarily be handled differently than if a male were taken hostage (A. 144). He also stated (A. 111):

> there is a basic difference in the—between a female and a male, which renders her less capable of physically subduing or protecting herself or subduing an inmate, should the occasion arise, and also part of that would be the—her mere physical presence, in my opinion, and other people's opinion, would incite trouble and there is a sexual connotation which should go without saying. She is a sex object. And you have inmates who are deprived of

sexual outlets, hetero-sexual outlet, and should be obvious. It is to me.[27]

Similarly, Mr. Bill Gilmore, Director of the Frank Lee Youth Center, a minimum security facility for youthful first offenders, testified that a female guard commanded less respect from the inmates than the male counselors due to the feelings of the inmates "about the role of a female and where her function is in society" (A. 292). He analogized the situation of female guards and male inmates to the attitudes of children toward their parents, with the mother being viewed as soft and the father as the authority figure (A. 291, 301).

Appellants thus sought to justify the preclusion of women from 70 percent of the correctional counselor jobs in the Alabama State system not by any practical data indicating that women cannot perform the role, but rather by a combination of speculative fears for safety based upon sex stereotypes imputed to prisoners and "romantic paternalism" on the part of the employer.[28] Cf. *Weeks* v. *Southern Bell Telephone & Telegraph Co., supra,* 408 F. 2d at 236. An interpreta-

[27] Mr. Tony Sewell, Director of the Mobile Work Release Center, had supervised two women out of a staff of seven for a period of one year (A. 251–252). He testified that in his opinion the women are not able to perform all the duties of a correctional counselor as capably as the men (A. 252). On cross-examination he admitted, as the district court noted (J.S. App. 43), that one of the two women was, in fact, a good employee and that he based his opinion upon the behavior of the other woman (A. 271).

[28] Although appellants emphasize the dangerous conditions which exist in the Alabama prison system (Br. 44), Commissioner Locke acknowledged (A. 120–121) that the state is subject to a federal court order requiring it to implement a classification system for inmates, eliminate overcrowding, and hire additional guards, and that "[t]he danger will be considerably reduced" when those actions are taken (A. 121). See also testimony of C. Robert Sarver (A. 83–84). The federal court order to which Commissioner Locke referred is found in *Pugh* v. *Locke*, 406 F. Supp. 318, 331–335 (M.D. Ala.), appeal docketed May 10, 1976, No. 76–2269.

In any event, the fact that the job of prison guard involves an element of danger is not sufficient to establish that women cannot perform it and, thus, that sex is a bona fide occupational qualification for the job. To the extent that the job of a prison guard in the Alabama all-male penitentiaries is a dangerous one, it is dangerous for both men and women. Appellants refer (Br. 44) to the testimony of Commissioner Locke that two guards were killed in 1974 and many guards have been wounded in assaults within the past three years (A. 119–120). Ms. Rawlinson was shown a picture of the body of one of the fatally wounded guards during her deposition and was asked whether she thought that brute strength would be important in stopping altercations. She replied, referring to the picture which showed multiple stab wounds, "It didn't help him very much" (Record p. 409).

tion of the bona fide occupational qualification rule that would permit the exception to be established merely on the basis of opinions based upon sex stereotyping or paternalistic feelings for women would allow the exception to "swallow the rule" (*id.* at 235).[29] In any event, the district court here properly found that the balance of the evidence demonstrated that the adverse effects claimed by appellants were illusory (J.S. App. 43–44).

[29] Appellants incorrectly rely upon the opinions expressed in a letter of December 18, 1975, from the General Counsel of the Equal Employment Opportunity Commission (Br. 35). The letter recites specifically that it "is not an opinion letter pursuant to 29 C.F.R. § 1601.30" (A. 39) within the meaning of Section 713(b) of Title VII, 42 U.S.C. 2000e–12(b)(1). The effect of that recitation

Appellees presented the testimony of Mr. William R. Nelson, Warden of the Metropolitan Correctional Center in Chicago, a federal maximum security institution. Mr. Nelson testified that before he started working with women as correctional officers in male facilities he had many concerns about their ability to function effectively in such a situation (A. 183–184), but that based upon his experience (A. 185):

> The performance of the women is very satisfactory and you cannot compare them as one sex to another. I would say, if you were comparing sex, there is no difference * * *.

He stated that the reaction of inmates to women is generally positive (A. 186) and that their presence has had a normalizing effect upon the institution.[30]

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is that reliance upon any statements made in that letter may not be used as a defense under Title VII, see *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, 997 (C.A. 5). In any event, that letter (A. 38–43) does not purport to approve appellants' policy, but merely points out some of the court decisions which have faced the issue and suggests some guidelines for the State of Alabama to follow.

As to the suggestion in the letter that the State continue, wherever possible, to employ male correctional personnel at all-female correctional institutions (A. 43), appellants do not mention that a typographical error resulted in a portion of the suggestion being omitted from the original letter. A corrected letter was later sent to the Commissioner of the Board of Corrections (A. 246–247). The omited portion of the letter suggested that the State also continue, wherever possible, to employ female correctional personnel in the all-male institutions.

[30] The Federal Prison System, Policy Statement No. 3713.7, dated January 7, 1976, states (J.S. App. 44): "The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. This integration of staff of both sexes into all institutions will promote this development."

In his view, the behavior of the men has improved because (A. 187):

> When a woman is on the unit, the men will behave more civilly, more normally. They must project an image which is compatible with the presence of a member of the opposite sex, as would be in any social setting.[31]

Finally, the district court was entitled to conclude that the credibility of appellants' speculations on prisoner reactions was undercut by the undisputed fact that the State "employ[s] females in contact positions at all-male institutions other than the four large penitentiaries * * * who perform the identical duties of their male colleagues, with the exception [of] naked searches and frisks * * *" (J. S. App. 43). The court below correctly ruled on the basis of this record that appellants had not satisfied the bona fide occupational qualification exception and properly rejected appellants' defense that all or most women would be unable to perform the duties involved in the positions under consideration.

C. THE INMATES' RIGHTS OF PRIVACY CAN BE RECONCILED WITH PLAINTIFFS' RIGHT TO EMPLOYMENT

Appellants' second justification is that the exclusion of women from contact positions in all-male penitentiaries is required in order to preserve the right of privacy of the male inmates. Where no accommodation could be made with inmates' rights to privacy in such matters as strip searches and the

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[31] See also A. 79 (testimony of C. Robert Sarver).

use of bathroom facilities, sex could be a bona fide occupational qualification. However, the district court found on the evidentiary record in this case that such a practical accommodation was feasible and that the evidence presented did not demonstrate that a sex qualification was "reasonably *necessary* to the normal operation" (Section 703(e), 42 U.S.C. 2000e–2(e)) of the four penitentiaries.

The record indicates that appellants themselves have accommodated the privacy rights of inmates in all-male non-penitentiary institutions where women correctional counselors are employed (J.S. App. 43–44) and that it is quite possible "to separate the sexual from the nonsexual aspects of the job." Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1183 (1971). The testimony of appellants' employees also demonstrates that procedures can be established to enable women to perform as correctional counselors, while ensuring bathroom privacy.[32] Federal Warden William Nelson testified that the women he supervises perform all of the duties that the male guards perform with the exception of strip searches of the male prisoners (A. 184). Yet nothing in the record indicates that appellants, like the federal warden, could not restrict the duties of women to avoid

[32] For instance, Mr. Sewell testified that it was his policy that, when performing a head count to determine whether all inmates are present, the female guard should not enter the bathroom area but should remain at the door until the inmate emerges so that she can assure by visual contact that he is present in the prison (A. 278).

strip searches while "still utili[zing] women so they perform an effective function within the institution" (A. 219). The evidence indicates that strip searches are such a minimal element in the correctional counselor's duties that they could hardly provide a rationale sufficient to classify sex as a "necessary" qualification for the correctional counselor's position. Indeed, at two of the four penitentiaries at issue, no systematic strip searches are conducted (A. 102, 105); at the others, only approximately 25 percent of the guards perform systematic strip searches (A. 103–104). At most, therefore, appellants have shown a need for some men to be included in the complement of correctional counselors at the penitentiaries—a showing that falls far short of justifying the complete exclusion of women from such employment.

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, this Court stated that where a complaining party under Title VII can demonstrate that other employment selection devices without an undesirable racial effect (or, as here, sexual effect) would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship,'" such a showing would be evidence that the selection device was a pretext for discrimination.[33] The record here demonstrated the

[33] Similarly, the doctrine of business necessity which has evolved under Title VII requires a finding that there is no acceptable alternative available which would accomplish the stated business purpose with a less discriminatory impact. See *Robinson* v. *Lorillard Corporation*, 444 F. 2d 791, 798 (C.A. 4), certiorari dismissed, 404 U.S. 1006, 1007; *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 879 (C.A. 6).

existence of alternative means of protecting inmates' privacy rights, and the court was justified in concluding (J.S. App. 45) that the:

> tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications. * * * We are convinced that procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job. See *Reynolds* v. *Wise*, 375 F. Supp. 145, 151 (N.D Tex. 1974).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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v.

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On Appeal
From the District Court, Jefferson County
For the Middle District of Alabama

[redacted]

MOTION FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE

[redacted]
WORKERS' LEGAL DEFENSE FUND
AND
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICI CURIAE

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Supreme Court of the United States

October Term, 1976

No. 76-422

E. C. DOTHARD, *et al.*,

Appellants,

v.

BRENDA M. MIETH, *et al.*,

Appellees.

MOTION BY WOMEN'S LEGAL DEFENSE FUND AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Women's Legal Defense Fund and the American Federation of Labor and Congress of Industrial Organizations hereby respectfully move for leave to file the attached brief *amici curiae* in the instant case, as provided for in Rule 42 of the Rules of this Court. Counsel for appellees have consented to the filing of that brief, but counsel for appellants have refused such consent. This motion and the attached brief are timely filed.

INTEREST OF THE AMICI CURIAE

Women's Legal Defense Fund ("Fund") is a non-profit, tax-exempt corporation founded in 1971 to secure equal rights for women, by providing volunteer legal representation in cases raising sex discrimination issues. The Fund also sponsors informational and educational activities on

legal issues of special interest to women. Many of the activities of the Fund involve employment discrimination against women.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 109 national and international unions, having a total membership of approximately 14,000,000 men and women. Women comprise a substantial portion of the membership of AFL-CIO affiliated unions. The AFL-CIO has appeared previously before this Court representing the interests of women union members in equal employment rights. See e.g., *Geduldig* v. *Aiello*, 417 U.S. 484; *Liberty Mutual Life Ins. Co.* v. *Wetzel*, 424 U.S. 737; *General Electric Co.* v. *Gilbert*, ... U.S. ....., 45 U.S.L.W. 4031 (Dec. 7, 1976).

THE ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The issues on the merits of this case are, first, whether a state height and weight limitation for employment as a prison guard may be maintained where it has the effect of excluding substantially more women than men and where no business necessity has been shown and, second, whether sex is a bona fide occupational qualification ("bfoq"), within the meaning of § 703(e) of Title VII of the Civil Rights Act of 1964, for employment in certain prison guard positions. Both of these issues are important; the second, in particular, requires elucidation of the bfoq defense, a task this Court has not heretofor undertaken and which could have a substantial impact upon the course of litigation involving employment discrimination against women.

Each of the present *amici*, in light of the importance of the issues presented, were prepared to file a brief *amicus*

curiae addressing those questions. On examining the Jurisdictional Statement and the opinion below, however, the present *amici* concluded that the case was not properly before this Court on direct appeal from a three-judge court, since the issues on appeal at this time raise only questions concerning the application of Title VII; there are no constitutional questions remaining in the case. Because we believe this case would benefit from full airing before the Court of Appeals for the Fifth Circuit, and because we believe the appeal should properly have been taken to that Court, we file this brief *amici curiae*, limited to the question whether this Court has jurisdiction over the present appeal. It is our understanding that neither the appellees nor any *amici* appearing on their behalf will cover this question.

CONCLUSION

Because the attached brief covers a jurisdictional question not addressed by the parties, this Motion for Leave to File a Brief *Amici Curiae* should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1976

No. 76-422

E. C. DOTHARD, *et al.*,

Appellants,

v.

BRENDA M. MIETH, *et al.*,

Appellees.

BRIEF FOR THE WOMEN'S LEGAL DEFENSE FUND AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

This brief amici curiae is filed by the Women's Legal Defense Fund ("Fund") and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), contingent on the granting of the foregoing motion to file a brief as *amici curiae*.

INTRODUCTION AND STATEMENT OF THE CASE

The issues on the merits of this case are, first, whether a state height and weight limitation for employment as a prison guard may be maintained where it has the effect of excluding substantially more women than men and where no business necessity has been shown and, second, whether sex is a bona fide occupational qualification ("bfoq"), within the meaning of § 703(e) of Title VII of the Civil Rights Act of 1964, for employment in certain prison guard

positions.[1] Both of these issues are important; the second, in particular, requires elucidation of the bfoq defense, a task this Court has not heretofor undertaken and which could have a substantial impact upon the course of litigation involving employment discrimination against women.

It is the conviction of the Fund and the AFL-CIO, however, that the present appeal is not properly before this Court. Rather, the appeal ought to have been taken to the Court of Appeals for the Fifth Circuit. To understand why this is so, some recapitulation of the procedural history of this case is necessary.

This case was filed by two women, Ms. Mieth and Ms. Rawlinson, each seeking to represent a class of similarly situated women. (J. App. 16, 20, 27).[2] Ms. Mieth was interested in a position as a state trooper for the State of Alabama. (J. App. 20). She met all the job prerequisites for the position except one: she was not "at least 5 feet 9 inches in height and [did not] weigh 160 pounds." (J. App. 18, 20). Ms. Mieth did not conform with the procedural steps required prior to filing a suit under 42 U.S.C. § 2000e-2, Title VII of the Civil Rights Act of 1964. Consequently, her suit arose only under 42 U.S.C. § 1983, for violation of equal protection of the laws under the Fourteenth Amendment (J. App. 32).

[1] The Jurisdictional Statement was limited to these questions. In their Brief on the merits, appellants have raised several other issues, including the constitutionality of Title VII as applied to the states and generally. (Br. for Appellants, at 2-3). These additional issues are not fairly included within the questions presented in the Jurisdictional Statement and, we trust, will be disregarded in accord with Rule 40(1)(d)(2) of the Rules of this Court.

[2] "J. App." denotes Appendix A, the opinion below, attached to the Jurisdictional Statement.

Ms. Rawlinson was interested in becoming a correctional counselor for the State of Alabama. However, the state by statute requires that to qualify for this position, an applicant must be at least 5 feet 2 inches and 120 pounds; Ms. Rawlinson did not meet the weight requirement. (J. App. 24, 27). In addition, the state by regulation has established a policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries. (J. App. 25). When Ms. Rawlinson's application for a position as correctional counselor was rejected, she filed a charge with the Equal Employment Opportunity Commission and, after the requisite period of time had elapsed, she received her "right to sue" letter. (J. App. 30-31). Consequently, Ms. Rawlinson was entitled to bring her suit for employment discrimination under Title VII, and she did so. (J. App. 32).

A three-judge district court was convened pursuant to 28 U.S.C. § 2281[3] "[b]ecause a statute and administrative orders of the Statae of Alabama [were] challenged on constitutional grounds, and injunctive relief [was] sought against state officials." (J. App. 17). The court concluded:

> that Ms. Mieth and her class were denied equal protection of the laws because the 5'9", 160 pound requirement for state troopers was intentionally discriminatory against women, and is "not rationally related to the achievement of any legitimate state interest." In its holding, the court applied the equal protection analysis as elucidated, with regard to employment discrimination, in *Washington* v. *Davis*, ... U.S. ....., 44 U.S.L.W. 4789. (J. App. 39).

[3] This statute, 28 U.S.C. § 2281 was repealed on August 12, 1976. Pub.L. 94-381, § 1, 90 Stat. 1119. Section 7 of Pub.L. 94-381 provides that the repeal "shall not apply to any action commenced on or before the date of enactment."

2. that "the height and weight requirements have been discriminatorily applied in the case of Ms. Rawlinson in violation of Title VII." (J. App. 42).

3. that "Regulation 204, insofar as it denies women jobs as prison guards in all-male prisons, is violative of Title VII and the Equal Protection Clause." (J. App. 45).

Only the latter two rulings have been appealed. (Jurisdictional Statement, at 4.) Therefore, Ms. Mieth's contentions, involving solely constitutional issues, are not before this Court.

ARGUMENT

Although this case apparently began with a single complaint, in fact the situations and contentions of the two plaintiffs were entirely distinct. Ms. Mieth and Ms. Rawlinson were interested in different jobs, administered by different state agencies, and were faced with different barriers to employment. In addition, Ms. Meith, because she had failed to comply with the procedural requirements of Title VII, had only a constitutional claim available to her, while Ms. Rawlinson could, and did, pursue her claim under Title VII.

Clearly, convening the three-judge court was proper with regard to Ms. Mieth's claims. For, under former 28 U.S.C. § 2281, in effect at the time this case was brought and decided, such a court was necessary when a suit was filed seeking to enjoin a state officer on constitutional grounds from enforcing a state statute.

Just as clearly, however, under recent decisions of this Court, it was at least the preferable course, with regard to Ms. Rawlinson's contentions, for the single judge with

whom the complaint was originally filed to proceed to decide the Title VII questions. Insofar as vindication of Ms. Rawlinson's Title VII claims merited enjoining the application of a statute or an administrative regulation, the injunction resulted from application of the Supremacy Clause of the Constitution. Injunctions based upon Supremacy Clause claims did not require action by a three-judge court under former § 2281 (*Swift & Co.* v. *Wickham*, 382 U.S. 111), and this Court has announced that "it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court." *Philbrook* v. *Glodgett*, 421 U.S. 707, 712-13 n. 8, relying on *Hagans* v. *Lavine*, 415 U.S. 528; see also *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 807 (White, J., concurring in the result).

It is important, in this regard, that this case was decided after this Court's decision in *Washington* v. *Davis, supra.* For *Washington* announced the rule that, to prevail in an employment discrimination case against a governmental entity based upon the equal protection guarantee, it is insufficient to demonstrate, as it often is under Title VII (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424), a differential impact upon disparate groups not justified by a business necessity; rather, an intent to discriminate must be shown.

Also revelant is the fact that, unlike racial discrimination, gender-based discrimination has not been declared inherently suspect; therefore, while an important state interest is required to justify such discrimination when attacked as a violation of equal protection, a compelling state interest is not necessary. *Craig* v. *Boren*, —— U.S. ——, 45 U.S.L.W. 4057; *cf. Reed* v. *Reed*, 404 U.S. 71. On

the other hand, under Title VII sex discrimination is treated exactly like race discrimination, with the sole exception of the availability of the bfoq defense. Since that defense requires that the gender qualification be "necessary" to the business asserting the defense, the Title VII standard is clearly at least as stringent as that imposed in sex discrimination cases under the equal protection guarantee.

As a result of the confluence of these two constitutional doctrines, an sex discrimination in employment claim against a state agency based upon the equal protection clause is necessarily superfluous where a claim under Title VII is also available; the constitutional claim cannot succeed if the Title VII contention fails. Under these circumstances, the fact that the plaintiff alleges violation of both Title VII and the equal protection clause, as Ms. Rawlinson did, ought not to influence the entire course of the litigation, by permitting the convocation of a three-judge court and a direct appeal to this Court in a case which is in actuality nothing but a Title VII case.

This Court, in *MTM* v. *Baxley, supra,* held that "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court *denying* interlocuatory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim." 420 U.S., at 804 (emphasis supplied). The Court noted that if a direct appeal were not permitted,

> "[d]iscretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the court of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most

mandatory appeals in summary fashion. [*Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 99,]

• • •

"It is certain that the congressional policy behind the three-judge court and direct-review apparatus—the saving of state and federal statutes from improvident doom at the hands of a single judge—will not be impaired by a narrow construction of § 1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration. *Phillips* v. *United States,* 312 U.S. 246, 250-251, 85 L. Ed. 800, 61 S. Ct. 480 (1941); *Gonzalez v. Employees Credit Union, supra,* at 98." (421 U.S., at 803-804.)

MTM, of course dealt only with situations in which an injunction was *denied;* here, the injunction was granted. And in *Philbrook* v. *Glodgett, supra,* the Court said:

> "In *Hagans* v. *Lavine,* this Court indicated that it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court. The District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint • • • and raised their statutory contention, for the first time, at oral argument before the three-judge court. • • • Appellant Weinberger urges us to reconsider our decision in *Engineers* v. *Chicago, R. I. & P. R. Co.* 382 U.S. 423 • • • in which we held that, if a three-judge court is convened and decides a case on statutory grounds, the judgment may be appealed to this Court under 28USC § 1253, but we decline to do so." (421 U.S., at 712-713 n. 8.)

Here, however, there was no impediment to proceeding in the manner preferred—that is, by having the single judge decide Ms. Rawlinson's Title VII contentions. Moreover, while the single judge here was theoretically presented "with both statutory and constitutional grounds for decision," in fact, as we have explained, no constitutional issue could remain in Ms. Rawlinson's case once the statutory issue was determined. Requiring an appeal to the Court of Appeals in the *Philbrook* situation could indeed present serious problems; if the Court of Appeals determined that the statutory claim was without merit, it would be without jurisdiction over the constitutional claim which remained, and a new round of litigation would be necessary. Here, since no constitutional issue would remain, this would not occur.

Because of the fortuity that Ms. Rawlinson's contentions were joined with another, separate cause of action in which convocation of a three-judge court was clearly proper, the decision to ignore the strong recommendations of *Hagans* is possibly explicable.[4] And, perhaps, had the state determined to appeal the entire case, there would have been a net saving in expenditure of judicial resources in permitting a direct appeal of Ms. Rawlinson's essentially Title VII case,

[4] *MTM* makes clear that the determination whether an appeal from a three-judge court which does not reach the merits of a constitutional claim ought to be a direct appeal to this Court does not necessarily require a determination that the three-judge court was without jurisdiction in the first instance. Therefore, it is not necessary here to decide that the three-judge court ought not to have reached the issues tendered by Ms. Rawlinson; it is sufficient to a decision that the present appeal is improper that a single judge *could* have decided the Title VII questions.

as well as Ms. Mieth's constitutional case.

As matters stand, however, there is no reason for permitting appellants to forego the ordinary route for appealing a Title VII case.[5] Indeed, to allow the direct appeal would be basically contrary to the decision Congress made in 1972 when it covered state and municipal employment under Title VII—that employment discrimination claims against public employers are to be treated under federal law precisely in the same way as are such claims against private employers. Moreover, it would appear that Congress, by repealing § 2281 as to future cases, has approved the thrust of this Court's decisions in *MTM, supra,* and *Gonzalez, supra*—that cases should ordinarily be aired in full before a Court of Appeals.

Therefore, without overruling the doctrine this Court declined to disturb in *Philbrook, supra,* this Court should announce that a direct appeal is available only if the constitutional issue will remain in the case once the statutory issue is decided. Appellants should consequently be directed to appeal to the Court of Appeals for the Fifth Circuit, with the right, of course, to file a petition for certiorari in his Court should the district court be affirmed on appeal.

[5] The three-judge court did, in determining the validity of Regulation 204, announce that it violated *both* Title VII and the Equal Protection clause. However, the analysis which led to this result seems to be entirely a Title VII analysis; and, as noted above, the Equal Protection decision could not stand if the Title VII determination were overruled. Moreover, having decided the Title VII issue, there was no reason whatever to decide the constitutional question and, in the interest of judicial restraint, that question should not have been reached *Hagans, supra.* Thus, the fact that the three-judge court purportedly decided a constitutional question ought not to influence the result.

CONCLUSION

For the reasons stated above, the appeal should be dismissed for want of jurisdiction.

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76-422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

E. C. DOTHARD, *et al.*,

Appellants,

—v.—

BRENDA M. MIETH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE*

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ARGUMENT:

THE BONA FIDE OCCUPATIONAL QUALIFICATION(BFOQ) EXCEPTION TO TITLE VII DOES NOT JUSTIFY BARRING ALL WOMEN, IRRESPECTIVE OF INDIVIDUAL CAPABILITIES, FROM EMPLOYMENT AS CORRECTIONAL OFFICERS IN MALE MAXIMUM SECURITY PRISONS. ANY BFOQ APPLICATION IN THIS CASE SHOULD BE NARROWLY CONFINED FOR A BROAD READING OF THE BFOQ WOULD SIGNIFICANTLY UNDERMINE THE PURPOSE OF TITLE VII'S BAN ON SEX DISCRIMINATION IN EMPLOYMENT, AND WOULD CAST A

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

E.C. DOTHARD, ET AL.,

APPELLANTS,

V.

BRENDA M. MIETH, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amicus respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Counsel for the appellees have consented to the filing of this brief; counsel for the appellants have refused consent.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law.

Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, the American Civil Liberties Union Foundation has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

The American Civil Liberties Union believes that this case, concerning the scope of 42 U.S.C. §2000e-2, the bona fide occupational qualification exception as to sex in Title VII of the Civil Rights Act of 1964, presents an issue significant to the achievement of full equality between the sexes.

Lawyers associated with the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Mathews v. Goldfarb, 396 F. Supp. 308 (E.D.N.Y. 1975), prob. jur. noted, 44 U.S.L.W. 3470 (February 24, 1976) (No. 75-699), and the petitioners in Struck v. Secretary of Defense, cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants and appellees, and as amicus curiae in this Court in several other gender discrimination and women's rights cases.

The purpose of this brief is to argue that the bona fide occupational qualification exception to Title VII is a narrow one which does not justify a blanket refusal to employ women as correctional officers in male maximum security prisons. Appellants did not prove below that it was necessary to be a male to work as a guard in Alabama's male penitentiaries. At the same time, current deplorable conditions in those penitentiaries, see Pugh v. Locke, 406 F. Supp. 318 (M.D.Ala. 1976), make this case more difficult than other BFOQ cases which have been decided by the lower federal courts. If the Court determines that because of these conditions, the lower court's decision should not be implemented until Alabama's prisons meet minimum constitutional standards, amicus urges that any BFOQ application in this case be narrowly confined to avoid encouraging a flood of attempts to revive BFOQ defenses which have properly been dismissed by the lower federal courts.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

E.C. DOTHARD, ET AL.,

APPELLANTS,

V.

BRENDA M. MIETH, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION

AMICUS CURIAE

Interest of Amicus

The interest of amicus appears in the foregoing motion.

Opinion Below

The opinion of the three-judge district court for the Middle District of Alabama is reported at 418 F. Supp. 1169 (1976) and is set out in the Jurisdictional Statement at Appendix A at 14-47.

Statute Involved

Section 703(a) and (e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provide:

> Sec. 703(a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex...; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex...
>
> Section 703(e): Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex.. in those certain instance where..sex ...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business

enterprise.

Question Presented *

Whether the bona fide occupational qualification exception as to sex in Title VII justifies the blanket refusal to employ women, irrespective of individual capabilities, as correctional officers in "contact" positions in Alabama's male maximum security prisons.

Statement of the Case

Amicus incorporates the Statement of the Case set out in Brief for Appellees.

Summary of Argument

The legislative history of Section (703(e), the "bona fide occupational qualification" exception to Title VII's ban on sex-based hiring, indicates that it is to be construed narrowly. EEOC Guidelines on Sex as a BFOQ also call for a narrow reading of the exception, and suffer from none of the infirmities which the Court found in General Electric Co. v. Gilbert, 45 U.S.L.W. 4031(December 7,]976).

* Although this case also presents the question whether height and weight requirements which impact more heavily on women violate Sec. 703(a), amicus will address only the BFOQ issue.

Evidence in the record of this case and a large and growing body of expert opinion on prison administration support the proposition that qualified women can work successfully as line correctional officers in male prisons, including those which house maximum security inmates. Moreover, there are significant penological advantages to integrating male and female correctional staff. Of course, prison administrators retain the right to require women applicants to demonstrate their individual suitability for the demanding work of a prison guard, and to dismiss those individuals who are hired but fail to perform adequately. The valid privacy interest of male prison inmates can be accommodated by selective work assignments among correctional officers rather than by refusing women employment altogether.

As a general matter, the inherent dangers of work as a prison guard do not justify barring women from the job. And no evidence credited by the district court proves that even the abysmal conditions found by the court in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), render Alabama's penitentiaries less safe for female guards. However, if in this Court's view, the chaos in these prisons warrants a special approach for these circumstances, the case should be remanded to the district court with instructions to retain jurisdiction until these institutions achieve minimum constitutional standards.

While it would be ironic if Alabama were to succeed in its claim that sex is a BFOQ for working in its male penitentiaries precisely because it has allowed conditions there to become so intolerable, it would be tragic if an unnecessarily broad opinion by the court in this case vitiated the gains women have won in the lower federal courts in more typical BFOQ cases. These decisions have rejected the contentions that assumed or actual differentials in average physical capabilities of the sexes may be made the basis for occupational disqualification in generic terms, or that the preferences or prejudices of customers can validate sex discrimination (absent interference with the company's primary function). The courts have rejected these BFOQ claims because to credit them would allow the §703(e) exception to swallow the §703(a) rule. If the BFOQ door is opened wider than the crack which may be warranted by the unique circumstances of this case, it will surely encourage a flood of ultimately unsuccessful attempts to relitigate issues long since correctly decided by the lower federal courts.

ARGUMENT

THE BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) EXCEPTION TO TITLE VII DOES NOT JUSTIFY BARRING ALL WOMEN, IRRESPECTIVE OF INDIVIDUAL CAPABILITIES, FROM EMPLOYMENT AS CORRECTIONAL OFFICERS IN MALE MAXIMUM SECURITY PRISONS. ANY BFOQ APPLICATION IN THIS CASE SHOULD BE NARROWLY CONFINED, FOR A BROAD READING OF THE BFOQ WOULD SIGNIFICANTLY UNDERMINE THE PURPOSE OF TITLE VII'S BAN ON SEX DISCRIMINATION IN EMPLOYMENT, AND WOULD CAST A SHADOW UPON A LARGE BODY OF WELL-REASONED PRECEDENT.

A. The Legislative History of the Bona Fide Occupational Qualification Exception and the EEOC Guidelines on Sex as a BFOQ Require that the Exception Be Construed Narrowly.

Under Title VII, the only statutory defense to an explicit sex classification prohibited by Section 703(a) is that provided by Section 703(e):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of sex ... in those certain instances where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....

When the BFOQ exception was initially considered by the House, it applied only to discrimination based on religion and national origin. The House Judiciary Committee Report on Title VII, which was written prior to the amendment of the BFOQ section to include sex, treats the BFOQ as to religion and national origin very restrictively:

> Section 703(e) provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification.

H.R. Rep. No. 914, 88th Cong., 1st Sess. 27 (1963). While this report does not specifically address the sex exception, the House Judiciary Committee's statement is probably the most reliable of the available legislative sources on the intended scope of the BFOQ concept generally.* See E. Crawford, The Con-

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* Indications of Congressional intent in enacting the BFOQ exception as to sex are scanty. There was neither a committee report or hearing record in the Senate on the Civil Rights Act, nor was there a Senate-House conference report. While there was some discussion of the BFOQ exception on the floor of the House, such debates are "generally entitled to little weight" in

struction of Statutes §§213-16 at 375-86 (1940). The sex exception was added to the House bill following a colloquy between Representatives Goodell and Bolton. An offhand example, indicating a privacy concern, was cited: "an elderly woman who wants a female nurse." 110 Cong. Rec. 2718 (1964). (Nothing was said of the male patient/female nurse or female patient/male doctor employment situation.)

(FN Cont.)

> discerning legislative intent, absent clear indications that the speakers are well informed and represent the views of their colleagues. 2A Sands, Sutherland Statutory Construction §48.13 at 217 (4th Ed. 1972). Applying this principle to the BFOQ exception, remarks made on the House floor are of minimal value. During the debate, a number of Congressmen were sufficiently confused to include race as one type of discrimination permissible on BFOQ grounds. 110 Cong. Rec. 2554-55(1964).

Not only does the most reliable legislative history source, the House Judiciary Committee report,* call for narrow reading of BFOQ exceptions, but a well-accepted canon of statutory construction points securely in the same direction: the BFOQ provision must be construed narrowly since it is an exception to a broadly remedial civil rights statute. Crawford, supra, §299 at 610.

Added reason for narrowly construing the BFOQ exception is provided by the grave concern about equal employment opportunities for women expressed by Congress in 1972, when it passed an amendment to Title VII, the Equal

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* But cf. the interpretive memorandum offered in the Senate by floor managers Clark and Case; according to the memorandum, the BFOQ exception creates:

> a limited right to discriminate on the basis of religion, sex or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.

110 Cong. Rec. 7213 (1964).

Employment Opportunity Act. In explaining why the amendment was needed, the House Committee on Education and Labor wrote:

> The situation of the working women is no less serious (than that of minorities)....
>
> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.
>
> Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.
>
> ...
>
> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices

> and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 4-5 (1971). See also S. Rep. No. 92-415, 92nd Cong., 1st Sess. 7-8 (1971).

Congress left it to the EEOC to articulate with specificity the scope of the BFOQ exception; the Commission has consistently, since 1965, taken the position that the exception "should be interpreted narrowly." 30 Fed. Reg. 14927 (Dec. 2, 1965); 29 C.F.R. §1604.2. The Commission states that it will find a BFOQ exception warranted "where it is necessary for the purpose of authenticity or genuineness...e.g., an actor or actress," and not warranted in the following situations:

> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

> (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers....

As this Court recently held, General Electric Co. v. Gilbert, supra, 45 U.S. L.W. at 4035-36, interpretative rulings such as the EEOC guidelines

> while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

None of the factors which the Court found prevented deference to the EEOC Guideline on pregnancy in Gilbert exist in this case. The Commission's position on the BFOQ exception as to sex was issued virtually contemporaneously with Title VII on December 2, 1965. The guidelines do not contradict any position taken by the Commission either before or after its issuance. Nor are there other indicia of the proper interpretation of the BFOQ which conflict with these guidelines.

Finally, the EEOC Guidelines on the BFOQ are a well-reasoned position which effectively implements Congressional intent. As recognized by numerous commentators, only if the BFOQ is narrowly interpreted can "Title VII's central message--that artificial, arbitrary, and unnecessary barriers to employment which are wrongly discriminatory must be eliminated--" be made a reality. Oldham, Questions of Exclusion and Exception under Title VII, 23 Hastings L.J. 55, 93 (1971). "If the exception is used simply to confirm the culturally accepted standards of what work a woman or man should be doing, the prohibition against discrimination on the basis of sex will be rendered meaningless." Cooksey, The Role of Law in Equal Employment Opportunity, 7 B.C. Ind. & Comm. L. R. 417, 429 (1965). See also Note, Developments in the Law--Employment Discrimination and Title VII, 84 Harv. L. Rev. 1109, 1179 (1971) ("The broad sweep of affirmative obligation on employers not to discriminate ought not to be diluted by a reading of the exception that invites the very sex-based judgment attacked by the statute's main policy"). At the same time, the EEOC interpretation of the BFOQ recognizes that there are situations where the intrinsic attributes of one sex or the other are a necessary qualification for the job.

B. The BFOQ Exception Does Not Justify Barring All Women, Irrespective of Individual Capabilities, From Employment as Correctional Officers in Male Maximum Security Prisons.

Where a facial exclusion on the basis of sex is challenged, the burden of proof is on the employer to demonstrate that the position in question falls within the BFOQ exception. E.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1969). Tacitly acknowledging this,* appellants tender argument that women are generically unfit to serve as guards in male maximum security prisons.

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* Throughout the proceedings below, and in its jurisdictional statement, appellants recognized that Regulation 204 involved facial sex discrimination, which could only be justified if sex was a BFOQ. Appellants now claim, however, that "Regulation 204 is facially neutral (as it) applies equally to both sexes"; "(t)he only gender based effect of the Regulation lies in the fact that there are more male prisoners than female in Alabama (and) (t)herefore, a disproportionate impact is suffered by women guards." Brief of Appellants at 48.

This new position flies in the face of the plain words of Section 703(a) of the Civil Rights Act as well as this Court's decision in Phillips v. Martin Marietta, 400 U.S. 542 (1971);

Appellants assert that "in an all male maximum security prison, the disruptive influence caused by a female guard in close contact with the inmates should be a matter of innate recognition." Brief of Appellants at 50-51. What appellants "innately recognize" is contradicted by record evidence in the case at bar, and by a large and growing body of expert opinion on prison administration. For example, the Federal Bureau of Prisons is committed to integrating both sexes into all its institutions, including its maximum security prisons, in order to promote "the goal of normalization as part of improving the correctional facilities."

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*(FN Cont.)

"Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex" (emphasis added). In cases where men or women are denied employment on ground grounds of their sex, the issue is not whether the resulting employment opportunities are equal in number but whether the sex-based decision is justified under §703(e). Thus, in Phillips the Court examined only the exclusion, not the employer's overall employment of women, which was high (see Phillips v. Martin Marietta Corp., 411 F. 2d 1,2 (5th Cir. 1969), rev'd, Phillips, supra, pointing out that 75 to 80% of the persons holding the position at issue were women).

Federal Prison System, Policy Statement No. 3713.7, January 7, 1976, J.S. at 44-45. Similarly, an eminent authority on penology urges staffing a model prison for "repetitively violent (male) criminals" with 40 to 50% women:

> That the injection of women into the prison at all levels, including that of front-of-the-line guard, will tend to reduce violence is offered as a confident proposition .... As a matter of observation, men behave better in the presence of women. The social skills of many male offenders in dealing with women are distorted and undeveloped. Frequent and constructive association with women as staff members of the prison will have a positive impact upon the prisoners' later social relationships.

Norval Morris, The Future of Imprisonment, 108-109 (1974).

A survey in the early 1970's reported that correctional administrators were beginning to find significant benefits to sexual integration of staffs at both male and female prisons:

> Women's prisons have traditionally had some staff integration, with male correctional officers assigned for security reasons. Because of the stereotype of male prisoners as more dangerous, however, female correctional officers were rarely assigned to male institutions. Recently, the

> administrators of several female institutions have come to see male staff as beneficial for reasons other than security: There is a feeling that the institutional atmosphere is more "natural" when members of both sexes are present as correctional officials. Some male institutions are also beginning to realize the advantages of sexually-mixed staffs, although they are generally still far behind in the process of integration.

Note, The Sexual Segregation of American Prisons, 82 Yale L.J. 1229, 1241 (1973).

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals stated:

> The time is long overdue for a careful inspection of the assumptions and biases that have barred women from most positions in corrections ... There appears to be no good reason why women should not be hired for any type of position in corrections.

National Advisory Commission, A National Strategy to Reduce Crime 125, 476 (1973).*

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* The Commission noted that discrimination in hiring and promotion of women throughout corrections, particularly in male institutions, had effectively eliminated women from management positions except in the few institutions for females. Id at 125. The EEOC reported in 1973 that 11.1% of correctional administrator positions on the

See also Law Enforcement Assistance Administration, Report of the LEAA Task Force on Women 14 (1975) (systematic exclusion of women from many correctional jobs is based on "irrational and outdated sex role stereotyping").

In 1974 California began hiring women to work in contact positions in male prisons. The Deputy Director of the California Department of Corrections reported one year later:

> Generally, female officers are functioning successfully in male institutions. Qualified, highly motivated women are being recruited, and experience has shown that women do apply for these positions. A captain who ten months ago felt that women had a limited place in corrections, now, after supervising women custodial personnel who perform all officer post assignments, states, "They have been accepted by male personnel and inmates and their individual potential for growth appears to be at approximately the same ratio as for a comparable group of male officers."

Becker, Women in Corrections: A Process of Change, 4 Resolution 19 (Summer, 1975). See also Ibrahim, Deviant Sexual Behavior

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(*FN Cont.)
state and local level were held by women, and only 9.2% of correctional protective service positions. EEOC, Minorities and Women in State and Local Government 1973, Vol. 1 at 111 (1973).

in Men's Prisons, 20 Crime & Delinquency 38, 44(1974) (increased employment of women in prisons suggested as one means of changing prison social structure to reduce abnormal sexual behavior among prisoners); Ward, Impact of Female Employees in Adult All-Male Correctional Institutions, 5 Crime & Delinquency Lit. 90 (1973); Scacco, Some Observations About Women and Their Role in the Field of Corrections, 34 Amer. J. of Corr. 10-12 (1972); Ruback, The Sexually Integrated Prison, 3 Am. J. Crim. Law 301, 323-24 (1975).

Appellants also attempt to support their BFOQ claim by contending that in high-security prisons there is "special danger to a female." Brief of Appellants at 50. The argument that sex is a BFOQ whenever performance of the duties of a job sought by a woman entails a risk of danger to her physical safety has been firmly rejected. As the Fifth Circuit pointed out in Weeks, supra, 408 F. 2d at 236, Title VII "vests individual women with the power to decide whether or not to take on unromantic tasks." In Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754, 758 (M.D. Ala. 1969), where the employer contended that the duties of commercial representative would subject a female employee to harassment and danger because she would have to make collections in bars, poolrooms and other locations, the court responded:

> Again, however, there is nothing in the record to indicate that these features of the position are functionally related to sex. They mean nothing more than that some women, and some men, might not wish to perform such tasks. Here, however, the record is clear that one obtains this position by bidding for it ....

Or, as California's highest court has declared:

> The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations.... Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment. (See Kanowitz, Women and The Law (1969) pp. 33-34.) We can no more justify denial of the means of earning a livelihood on such a basis than we could deny all women drivers' licenses to protect them from the risk of injury by drunk drivers. Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women. (Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 9-10, 485 P. 2d 529, 534 (1971).

Of course, this does not mean that all women who apply for the job must be given it. Prison administrators may require women applicants to demonstrate

their individual suitability for the demanding work of a prison guard.* As Dean Morris points out:

> (I)t need hardly be noted that front-line work in a (male) maximum security prison is not the kind of work that will be attractive to a majority of women (or men, for that matter) or for which a majority will be suited. Women recruits will need to be made sensitive to the problems of sexual anxieties that are noticeable in many individuals who have been incarcerated for a long period of time. Fears of sexual inadequacy and hence of sexual readjustment upon release are substantial in prison. Not only younger women should be recruited; the work is suitable for more mature women also and mothers and other women coming back into the work force should be included.

Morris, supra at 109.

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* The Court below noted that one of appellants' witnesses based his opinion as to the unsuitability of women as correction officers in large measure upon the poor performance of one female officer under his supervision. As the Court correctly observed, "if a woman cannot or does not perform her assigned duties, she may be suspended or removed permanently from her job.... This is no reason, however, that all women cannot adequately perform." J.S. at 43.

Alabama argues before this Court, but simply did not prove to the district court, that because "guards are an extreme minority in a prison" and are required to "use ...psychological methods as a first defense," all women must be barred from employment in male maximum security prisons. Brief of Appellants at 51. Appellees' experts, experienced correctional administrators, provided ample support for the district court's conclusion that the ability to cope with male prisoners was not a function of sex:

> Q. What qualities do you think a guard should possess in order to cope with the job's element of danger?
>
> A. Common sense, fairness, stability, mental and emotional.
>
> Q. Do you think this ability to cope is dependent on the guard's sex?
>
> A. No, it is not.
>
> Q. Do you think it's dependent on physical strength?
>
> A. None. There is no way physical strength could help you in a situation like that.

Deposition of C. Robert Sarver, App. at 81-82.

* * *

> Q. Relatively speaking, how important, in your opinion, is

physical strength versus emotional and psychological fitness?

A. Well, physical strength is only utilized at a time of confrontation, and ability to deal with tact and diplomacy and competency is called upon almost at all times, so if you were going to weigh the two...I would say I would put a greater value on the ability to deal effectively with inmates than their physical strength.

Q. In your opinion, is the ability to cope with the job's elements of danger dependent upon the officers' sex? In other words, if you had two Correctional Officers and you knew nothing else about either of them except their sex, could you say, on the basis of sex alone, which one would be able to cope better with the elements of danger?

A. No, I could not, on those limited factors.

Q. Could you say, on the basis of the officers' sex, which one would be better able to maintain security and order?

A. No, I could not.

Deposition of William Nelson, App. at 190-191.

Although the court below properly refused to accept appellants' unsubstantiated assertions that women were

inherently unsuited for the job or that the job's dangers precluded employing any women, it did take proper account of the privacy interest of the male inmates. This interest, however, was viewed in the context of the prison environment where little "privacy" is accorded to inmates.*

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* Of course, the court recognized the inconsistency of the state's position since it permitted women to work in male youth correctional facilities and to patrol on those premises communal toilet and shower facilities similar to those in the large penitentiaries. J.S. at 43. Moreover, one of respondents' witnesses stated:

> It strikes me as funny that the Alabama Prison System is at all concerned with the rights of privacy of the inmates. It never has been before. In my opinion, it doesn't make a bit of difference whether that privacy is being invaded by a male or a female.... Alabama prisoners don't have any privacy now. Even in isolation there are as many as four or five people in a cell.

Deposition of C. Robert Sarver, App. at 84,89. Other authorities have suggested that "the concepts of privacy and prison are antithetical beyond comprehension. The prison is, almost by definition, a place where the resident has lost his privacy, and his identity, and has become a number." Singer, Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degredation Process in Our Prisons, 21 Buff. L. Rev. 669(1972). See also Doe v. Duter, 407 F. Supp. 922 (W.D. Wis. 1976).

Thus, the district court concluded that the strip search function could be restricted on the basis of sex in order to avoid unduly invading the inmates' privacy. This restriction, however, did not amount to a BFOQ for all guard jobs. The district court said (J.S. at 45):

> This tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications.... Only a small percentage of the correctional counselor work force is involved in conducting systematic strip searches.

The district court's careful treatment of the BFOQ exception is consistent with Congressional intent and scholarly opinion, for it is clear that the individual's interest in bodily privacy merits weight in the balance. That interest would even rise to the level of a BFOQ when it is centrally involved in the work situation.* For example, the BFOQ exception is considered applicable to the position of a restroom or locker room

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* Moreover, the Equal Rights Amendment was passed by Congress with the understanding that the bodily privacy interest would permit a separation of the sexes with respect to such places as public toilets. S. Rep. No. 92-689, 92d Cong., 2d Sess. (1972).

attendant (who actually provides personal services for persons inside the restroom). Landau, Arbitration and Women's Employment, 23 Hastings L.J. 95, 127 (1971). As a widely cited commentary explains:

> (Although) analytically similar to consumer preferences which are forbidden by the Act, (strongly held taboos in the sexual privacy area) may be less objectionable since their net effect does not foreclose a significant portion or the job market to either sex. Moreover, operation of these taboos does not brand one sex or the other as incompetent to perform the job. Rather, it posits that the mere presence of a member of the wrong sex would be too disruptive.
>
> ...
>
> (However), because of the heavy presumption against allowing one sex to monopolize an occupation whose duties can be performed by members of either sex, employers should be required, wherever possible, to separate the functions for which sex is essential from those for which sex is non-essential, and to hire on a nondiscriminatory basis for the latter.

Developments, supra 84 Harv. L. Rev. at 1183, 1186.

California's experience illustrates the viability of the accommodation outlined by the district court:

The policy in California is that, under ordinary circumstances, female officers will not skin-search inmates; in an emergency situation, however, any officer might be expected to perform this function. (A similar policy has been used successfully at the two all female facilities with male employees for several years.) Female officers routinely pat-search inmates as their post orders dictate. In showering, some minor alterations have been made. Some institutions use modesty screening, which allows visibility of only the upper portions of the body,and one facility has fogged the windows looking into the shower area so that just outlines of figures can be seen.... Interestingly, most male staff now feel that giving the inmates some privacy is important and humane even when only male staff are present.

Becker, supra, 4 Resolution at 2-3.

C. Any BFOQ Application in this Case Must be Narrowly Confined to Avoid Undermining the Central Thrust of Title VII.

Ironically, the dismal conditions of Alabama's penitentiaries afford Alabama its most convincing argument on the BFOQ issue. These conditions led District Judge Johnson to rule in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), that Alabama's penitentiaries violated the Eighth Amendment rights of the inmates they housed. Thus, counsel for appellants repeatedly asked appellees' expert wit-

nesses whether they would approve the employment of women guards under the following circumstances (all of which had been found to exist by the Court in Pugh):

> Where the institution is horrendously overcrowded.... In a dormitory type situation where the bunks in the dormitories are often packed together so closely that there is no walking space between them and sanitation and security are impossible to maintain.... Where the (sic) appreciable percentage of inmates are suffering from some mental disorder and the mentally disturbed are dispersed throughout the prison population without receiving treatment and the makeup of this population is ten percent psychotic and another sixty percent are disturbed enough to require treatment.... Where violent inmates are not isolated from those who are young or passive or weak.... Where ... extortion, theft and assaults are everyday occurrences among the general inmate popultion.... Where there is an extremely high inmate-to-staff ratio which makes personal interaction between the two, inmates and staff, virtually impossible because staff members must spend all their time attempting to maintain control or protecting themselves.... Where ...violence is rampant and there is a jungle atmosphere.... Where most prisoners carry some form of homemade or contraband weapon.... Where there are too few guards to prevent outbreaks of violence or even stop those which occur....

App. at 194-195.

As appellees' expert noted, a prison system having these characteristics is, to say the least, "obviously a very abnormal environment for human beings to be placed in." Deposition of Raymond Nelson, App. at 197. At the same time, he granted, he would be hesitant to introduce women guards into a setting "as grossly abnormal as you have described." App. at 197. Alabama's Commissioner of Correction, who characterized the atmosphere of the state's prisons as "dangerous to the guards," conceded that upon implementation of the district court order in Pugh, which called for a reduction in inmate population of almost 50%, an increase in personnel of over 80% and classification of inmates, "a lot of tension will be eliminated" and "the danger (to guards) will be considerably reduced." App. at 120-121.

No evidence credited by the district court proves that these conditions render the prisons less safe for female guards than for male guards. However, if in this Court's view, the severe chaos and danger in Alabama's male maximum security prisons warrants the conclusion that sex is a BFOQ, amicus urges the Court to remand the case to the district court with instructions to retain jurisdiction until Alabama brings these institutions up to minimum constitutional standards. See Wolff v. McDonnell, 418 U.S. 539, 571-72 (1974); Doe v. Duter, supra, 407 F. Supp. at 925.

While it would be ironic if Alabama were to succeed in its claim that sex is a BFOQ for working in its male penitentiaries precisely because it has allowed

conditions in those institutions to sink to such an abysmal level, it would be tragic if an unnecessarily broad opinion in this case vitiates many of the gains women have won by virtue of lower court decisions in more typical BFOQ cases.

Never interpreted by this Court,* the BFOQ sex exception is the subject of a considerable body of lower federal court decisions.** Although the precise form-

---

* In Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), the issue was whether it was a violation of section 703(a) for the company to refuse to hire women with pre-school age children while employing men similarly situated. The question whether such family obligations could constitute a BFOQ was never reached by the Court.

** As late as 1975, a leading text noted:

> Minority workers have now moved beyond the stage of attacking policies which are discriminatory on their face... to raising the disparate impact argument, or challenging apparently evenhanded policies as giving present-day effect to past discrimination without business necessity.... Women workers, on the other hand, still face open job segregation and other overt discriminatory practices, because employers and unions have not yet generally accepted the fact that sex discrimination is illegal.

Babcock, Freedman, Norton, & Ross, Sex Discrimination and the Law 230 (1975).

mulations have varied, these decisions have uniformly confined the BFOQ exception to a narrow ambit. See, e.g., Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio) rev'd on other grounds, 474 F. 2d 949 (6th Cir. 1971); LeBlanc v. Southern Tel. & Tel. Co., 333 F. Supp. 602 (E. La. 1971), aff'd, 460 F. 2d 1228 (5th Cir.), cert. denied, 409 U.S. 990 (1972). Witt v. Sec. of Labor, 397 F. Supp. 673 (D. Me. 1975); Tracy v. Oklahoma Dept. Corr., 8 EPD ¶9713 (D. Okla. 1974); Wilson v. Sibley Memorial Hosp., 340 F. Supp. 686 (D.D.C. 1972), rev'd & rem'd on other grounds, 488 F. 2d 1338 (D.C. Cir. 1973).

The uniform approach to the BFOQ defense is attributable to the common themes in employers' attempts to invoke the exception, and the commitment of

courts to insure that the exception does not swallow the rule. The common themes have been stereotypical views of the physical capabilities of women and the assertions of customer preference. For example, in ruling that the "arduous nature of work-related activity (did not) render women physically unsuited for the jobs" and that women must be permitted to compete for the position of agent-telegrapher, the Ninth Circuit declared:

> Based on the legislative intent and on the Commissioner's interpretation, sexual characteristics, rather than characteristics that might, in one degree or another correlate with a particular sex, must be the basis for the application of the BFOQ exception....
>
> The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on equal footing with men. Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 236 (5th Cir. 1969). The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon

> a showing of individual incapacity. See Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 718 (7th Cir. 1969). This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work.

Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219, 1225 (9th Cir. 1971).

The Seventh Circuit has likewise rejected the proposition that assumed or actual differentials in average physical capabilities and physical limitations of the sexes may be made the basis for occupational qualifications in generic terms. It held:

> Colgate may, if it so desires, retain its 35-pound weight-lifting limit as a general guideline for all of its employees, male and female. However, it must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis.

Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 718 (7th Cir. 1969).

Another common claim has been that customer preference constitutes a BFOQ. In Diaz v. Pan American World Airways, 442 F. 2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971), the Fifth Circuit ruled that an airline could not

bar men from becoming flight cabin attendants despite trial court findings that passengers preferred service by female stewardesses:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preference and prejudices of the customer to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

If these defenses were credited, Title VII's ban on sex discrimination would be eviscerated. As the Diaz court said, in declaring that close scrutiny of the language of §703(e) compelled a narrow interpretation of the BFOQ exception:

> The sentence contains several restrictive adjectives and phrases: it applies only "in those certain instances" where they are "bona fide" qualifications "reasonably necessary" to the operation of that "particular" enterprise. The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if an employer could

> legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed for it would largely emasculate the act.
>
> The use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively (emphasis in original).

Id. at 387-88.

This case is unique among cases presenting a BFOQ defense. No other BFOQ case has involved both a question of invading the bodily privacy of those who lack the freedom to choose whether to permit the invasion and the chaos and open violence of the Alabama prison system. In other BFOQ cases, there is no question about serious injury resulting to the woman worker which may prevent her from performing her job of protecting others. The concern instead is the "protective" one which seeks simply to keep women from difficult tasks out of a purported interest in women's welfare. This Title VII forbids.

In short, the issues involved in the usual BFOQ case* are the employers' "chivalrous" concern about the dangers of the job for which the woman applied, e.g., Rosenfeld v. Southern Pacific, supra, or a vicarious assertion of customer preference for employees of a particular sex, e.g., Diaz v. Pan American, supra, or a claim that the average woman or man would not be able to perform the required tasks, e.g., Bowe v. Colgate, supra -- not the more troubling issue presented in this case.

Because of the unique issue presented in this case, it is important that any credence accorded the BFOQ defense here not cast a cloud upon the uniform body of case law developed by lower federal courts restricting the BFOQ defense to a very narrow ambit. If the BFOQ door is opened wider than the crack needed to accommodate the rare situation, it will surely encourage a flood of ultimately unsuccessful attempts to relitigate issues long since settled in this highly sensitive area of employment discrimination law.

---

* Cf. Note, supra, 23 Hasting L.J. at 86:

> Most of the contemporary cases presenting BFOQ questions fall into three areas: those dealing with protective laws, those raising problems of social mores or morality and those involving the preferences of consumers or co-workers.

Conclusion

For the reasons stated above, the decision of the United States District Court for the Middle District of Alabama should be affirmed, or in the alternative the case should be remanded to the District Court for reconsideration in light of Pugh v. Locke, supra.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976
No. 76-422

E. C. DOTHARD, et al,

Appellants,

v.

BRENDA M. MIETH, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF WASHINGTON STATE HUMAN RIGHTS COMMISSION, AMICUS CURIAE

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INTEREST OF AMICUS

The Court's disposition of this case will have a significant impact on employment of women in correctional institutions throughout the United States. The State of Alabama argues here that women should not be employed in prisons housing male felons; however, the State of Washington, by its Division of Adult Corrections and its Human Rights Commission, takes a strong position opposed to that of Alabama. The Washington Division of Adult Corrections has indicated a strong interest in working toward employment of more

women "inside the walls" of the state's adult male correctional institutions; its chief concern in this regard has been the legitimate concern for inmate privacy. (The same question, of course, applies to employment of men in women's prisons.) This concern has led the Division of Adult Corrections to petition the Washington State Human Rights Commission for a ruling on whether sex is a "bona fide occupational qualification" because of the inmates' right to be free from unwarranted intrusions upon personal privacy. The Washington State Human Rights Commission has issued its ruling, and wishes to inform this Court of Washington State's position on the bona fide occupational qualification issue raised by the *Dothard* case. This brief *amicus curiae* is therefore filed pursuant to U.S. Supreme Court Rule 42(4), urging affirmance of the District Court.

QUESTION PRESENTED

Whether Being Male is a Bona Fide Occupational Qualification for Employment as a Guard in a Male Prison, for Reasons of Inmate Privacy or for Reasons of Security.

SUMMARY OF ARGUMENT

The Washington State Human Rights Commission has repeatedly ruled that the right of privacy is a legitimate employment consideration. However, the Commission has invariably ruled that privacy considerations justify an employment disadvantage to one sex or the other *only* where there

exists unavoidable conflict between the right to be free from discrimination and the right of privacy. In other words, the Commission requires the employer to find and take the *least restrictive alternative.* Selective work assignments, schedules, etc. are avenues *strongly* preferred over any exclusionary employment policy. Only where sexual privacy will necessarily be invaded and where no alternative exists does the Commission consider sex to be a bona fide occupational qualification in employment, and then only to the extent necessary to protect the privacy. The Washington State Human Rights Commission strongly suggests to this Court that a balancing of the two rights is the correct approach to apparent conflict between privacy rights and employment rights. While the two may seem at times incompatible, they are yet never in actual warfare; a closer look and a small amount of flexibility on the part of employers preserves both the right of privacy on the one hand and the greatest measure of employment opportunity on the other.

Specifically, the Commission has considered the question presented by this case: the privacy rights of prison inmates balanced against the rights of women to be equally employed. It was the conclusion of the Commission (and the Commission urges its approach to this Court) that sex may be a consideration in employment of prison guards *only* where and to the extent that no alternative is available to alleviate or eliminate the privacy conflict.

Washington State Human Rights Commission Declaratory Ruling No. 19, 1 Washington Human Rights Reporter ..... (February 1977).* The burden is on the employer institution to reduce to a minimum the number of tasks and times and places which will require one or the other sex only. Then the balance is reached by recognizing the legitimate right of privacy and finding the least restrictive alternative, that which will reduce or eliminate the need for excluding one sex or the other.

The Commission has also considered whether being male is a bona fide occupational qualification for patrol or prison guard jobs for reasons of *security*. In its ruling denying a bona fide occupational qualification, the Commission noted that training is the critical factor in such jobs, and that individual capabilities must be considered. Washington State Human Rights Commission Declaratory Ruling No. 12, 1 Washington Human Rights Reporter IC-17 (September 1974). The law against discrimination means nothing else. The Commission urges this Court to look with caution upon arguments based on emotionalism and historical stereotypes, and to inquire instead whether Alabama can support its exclusionary hiring policy with observable, reportable facts.

*See Appendix C for text of declaratory rulings.

ARGUMENT

I. Legitimate Considerations of Inmate Privacy Do Not Justify an Exclusionary Hiring Policy.

The Washington State Law Against Discrimination prohibits sex discrimination in employment. Revised Code of Washington 49.60.030, 49-.60.180.* Two exceptions are recognized by the statute: bona fide occupational qualification (Revised Code of Washington 49.60.180(1)), and "where the [Washington State Human Rights Commission] by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes." Revised Code of Washington 49.60.180(3). The Washington State Human Rights Commission is the state agency established by the legislature with general powers to enforce its Law Against Discrimination. Revised Code of Washington 49.60.010, Revised Code of Washington 49.60.120.

Washington's Administrative Procedure Act authorizes state agencies to issue declaratory rulings "with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it." Revised Code of Washington 34-.04.080. By regulation, the Washington State Human Rights Commission has encouraged employers to seek such rulings before proceeding to consider sex (or any other protected category) as a bona fide

*See Appendix A for text of statutes.

occupational qualification in particular employment circumstances. Washington Administrative Code 162-16-030.* Procedures applicable to petitions for Commission rulings are set out in Washington Administrative Code 162-08-620.

A number of employers have availed themselves of this procedure and have petitioned the Commission for declaratory rulings as to whether sex can be a bona fide occupational qualification given their particular circumstances. Several of these petitions have raised the issue of personal privacy in various contexts, thus affording the Commission the opportunity to give repeated and measured consideration to the privacy question. The most recent petition raised one of the specific questions before the Court in this case: whether the right of privacy of prison inmates justifies the exclusion of women from certain guard jobs in male adult prisons. Washington State Human Rights Commission Declaratory Ruling No. 19, 1 Washington Human Rights Reporter ..... (February 1977).**

The Commission has had a number of years in which to develop its policy balancing the rights of privacy and freedom from discrimination. In June 1974 the Commission issued its Declaratory Ruling No. 10, holding that being male or female is a bona fide occupational qualification for locker room equipment clerks where, as in the facts presented, the clerks distributed clothing and equipment inside

*See Appendix B for text of regulations.
**See Appendix C for text of declaratory rulings.

and/or adjacent to shower and locker room facilities. The Commission stated:

> Community standards and respect for privacy require that a woman be free from the presence of members of the opposite sex during the use of locker room and shower room facilities and the same, of course, applies to men. This basic privacy consideration is discussed generally in the Law Against Discrimination with respect to terms and conditions of employment where it says that "it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex." RCW 49.60.180 (3).

Washington State Human Rights Commission Declaratory Ruling No. 10, 1 Washington Human Rights Reporter IC-14, 15 (June 1974).

Thus the Washington State Human Rights Commission in its first consideration of privacy recognized the legitimacy of privacy rights and recognized also that the state legislature in fact intended to incorporate a balance of the rights of privacy and of nondiscriminatory employment when it specifically permitted sex-segregated washrooms and locker facilities.

In January of 1975 the Commission was asked whether sex is a bona fide occupational qualification for clothing salespersons. The Commission stated:

> We tend to agree with your position that the presence of male sales personnel may have an adverse impact upon the conduct of a "fashion party" where women's clothes are taken off and

put on in the presence of others. We must stipulate, however, that being female, in this context, is a bona fide occupational qualification for sales personnel only if it is not reasonably practicable to have the female customers remove themselves to another room for the purpose of dressing and undressing.

Our concern here is for protection of personal privacy. If it is common for your customers to dress in private and then model their clothing to a group setting, then it would be our opinion that males are capable of performing the sales job. If, however, the dressing is done in front of the group, then we would rule such a setting to be one in which being female is a bona fide occupational qualification. We make this ruling cautiously, however, and emphasize that the burden is on the employer to show that no *reasonable alteration of operations* could occur which would eliminate the need for employing only one sex. (Emphasis in original)

Washington State Human Rights Commission Declaratory Ruling No. 13, 1 Washington Human Rights Reporter IC-19, 20 (January, 1975).

With this ruling the Commission began to define the factors important to the balancing between privacy and employment rights, and established the standard that only where the employer shows that no reasonable alteration of operations could occur will privacy considerations justify considering sex to be a bona fide occupational qualification.

In March of 1975 the Commission rejected a privacy argument. An employer sought a ruling that

being female was a bona fide occupational qualification for "hostesses" who welcomed new community residents, in part because the hostesses usually contacted housewives at home when they might be informally dressed. The Commission reiterated its no reasonable alternative standard, emphasizing that no bona fide occupational qualification can exist where "There could occur a reasonable alteration of the employer's practices which would eliminate the need to discriminate." Washington State Human Rights Commission Declaratory Ruling No. 15, 1 Washington Human Rights Reporter IC-28, 29 (March 1975).

In June of 1975 the Commission again considered the privacy question, this time in the context of university residence hall custodians. In substantial clarification of its no reasonable alternative standard, the Commission ruled:

> We again restate our position that the Law Against Discrimination permits sex being considered as a BFOQ where it is necessary to protect personal privacy *and* where no reasonable alteration of an employer's practice could occur which would eliminate a need to discriminate. With specific reference to the situation that you bring before us, that of residence hall custodians, we would rule that sex is a BFOQ provided that:
>
> (1) a necessary and significant portion of a custodian's job is to clean in areas where persons are normally and necessarily disrobed, i.e., shower and bath rooms;

(2) no reasonable alteration of the physical characteristics of the building could occur which would eliminate the need to discriminate;

(3) no reasonable alteration in the scheduling of the usage of the private areas in question could occur which would eliminate the need to discriminate;

(4) no reasonable alteration of the scheduling of the custodial force could occur which would eliminate the need to discriminate;

(5) the BFOQ applies only to those custodial positions for which a major portion of the work involves cleaning private areas;

(6) the BFOQ applies only to the extent necessary to make available in the custodial workforce the minimum numbers of males and females required to accomplish the cleaning of the halls.

It is our interpretation of the law that, whenever possible, it is required that the University first explore all possible methods of carrying out the maintenance of residence halls short of considering sex to be a BFOQ. For example, if it is possible to interrupt the usage of a particular restroom or bathing area for the period required to clean it, then such should be done, rather than resort to the employment of persons of only one sex. Similarly, if it is possible to rearrange the scheduling of the existing workforce in order to provide coverage for the private areas in question without resorting to the use of the BFOQ exemption in the law, then such should, as a matter of law, be the first action taken. And, of course, the BFOQ exemption should apply only to certain custodial positions, not to all.

Having recognized the legitimate application of the BFOQ provision of the law, within limitations, to the employment of residence hall custodians, we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be a BFOQ in hiring when it is merely necessary to *assign* persons of one sex or the other to a particular task. But where there are inadequate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial measure. (Emphasis in original)

Washington State Human Rights Commission Declaratory Ruling No. 16, 1 Washington Human Rights Reporter IC-30, 31 (June 1975).

With Declaratory Ruling No. 16, the Commission refined and made specific the criteria underlying the no reasonable alternative standard. The standard will apply "where persons are normally and necessarily disrobed," and the elements of the standard include the employer's attempt to eliminate the need to discriminate by alteration of physical structures, alteration of work schedules, alteration of schedules of usage of 'private' areas. The burden is upon the employer to show that a major portion of the job *necessarily* infringes upon privacy, that no reasonable alternative is available.

The Commission next considered the privacy

question in July of 1976. The employer was a state residential school for children afflicted with cerebral palsy. The older children objected to receiving intimate bodily care (bathing, toilet care and dressing) from attendants of the opposite sex. The attendants in question had no medical or other training. The Commission ruled that requirements set out in its earlier Declaratory Ruling No. 16 (*supra*) applied to these facts, and that insofar as necessary to ensure availability of attendants of both sexes to provide intimate care for older children, the school would be permitted to hire a sex-balanced work force. The Commission placed particular emphasis on the fact that the service and care rendered by the attendants "is uniquely intimate * * * involving contact with and view of the intimate portions of a client's anatomy." Washington State Human Rights Commission Declaratory Ruling No. 17, 1 Washington Human Rights Reporter IC-32, 35 (July 1976).

Thus the Washington State Human Rights Commission has for years been striking a balance between the right of privacy and the right to be free from sex discrimination in employment. Its most recent ruling considers the precise question presently before this court: to what extent, if any, the right of privacy justifies exclusion of women from employment as prison guards. The Washington State Human Rights Commission concluded that legitimate concern for privacy justifies certain sex-

exclusive work assignments and may in rare instances justify sex-exclusive hiring—where the institution has met the burden of showing no reasonable alternative exists.

The opportunity for this ruling was afforded by concern for inmate privacy on the part of the Division of Adult Corrections of the Washington State Department of Social and Health Services. The director of that division joined with the chief of the Department's Office of Minority Affairs/Affirmative Action to petition the Commission for a ruling that sex be a bona fide occupational qualification where inmates are "normally and necessarily disrobed," and where certain other circumstances cannot be altered. Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 2. The Commission ruled that privacy considerations would justify excluding one sex from certain work assignments in the corrections institutions. However, the Commission insisted that every alternative be first exhausted:

> We conclude that the personal privacy rights of the residents justify the consideration of the sex of employees in making work assignments within the institutions. Every effort must be made, however, to minimize the need for sex-based work assignments, since such distinctions may restrict the opportunities of members of a particular sex to obtain diversified work experience. The "business necessity" standard should be met in establishing the need to make sex-

based work assignments, including a showing that no reasonable operational alternatives exist. Such alternatives as restructuring job duties, altering work schedules, and modifying programs and physical structures must be explored and are preferred as alternatives to sex-based work assignments. Our ruling permits consideration of sex in setting work assignments only in connection with positions where the issue of personal privacy affects necessary and major portions of the job duties in question after a thorough job-by-job analysis. Additionally, our holding is based upon the requirement that an equal standard of personal privacy be enforced in both male and female correctional institutions.

Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 3-4.

Further, the Commission ruled that sex-based work assignments may not be permitted to interfere with promotional opportunities or other terms and conditions of employment. Declaratory Ruling No. 19, *supra*, at 4. As to sex-exclusive *hiring* of guards, the Commission had the following to say:

> It is our determination in connection with this petition that sex not be considered a BFOQ in the hiring of correctional staff, except when necessary as a short term and remedial hiring measure within the above described conditions, and only when customary hiring methods will fail to produce an adequate sexual mix of employees. In any event, we can find no justification for excluding members of either sex from applying for employment at a correctional institution and being placed on a register of available qualified applicants.

Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 5.

It is thus apparent that in its development of a balancing approach to the privacy issue the Washington State Human Rights Commission has reached precisely the conclusion reached by the district court below:

> This court is of the opinion that this tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications * * * . We are convinced that procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job.

Mieth v. Dothard, 418 F.Supp. 1169, 1185 (M. D. Ala. 1976).

It is clear that a balancing of the two rights is inevitable; the Washington State Human Rights Commission urges this Court that the balancing is best accomplished, with least violence to either right, by application of the 'no reasonable alternative' standard.

II. Considerations of Security in Adult Male Penitentiaries Do Not Justify Alabama's Sex-Exclusive Hiring Policy.

Alabama asks this Court to uphold its Board of Corrections Administrative Regulation No. 204,* which establishes a sex-exclusive hiring policy for virtually all guard positions in state prisons. Alabama defends its regulations on several grounds, one of which is privacy (discussed in §I, *supra*). The other rationale argued by Alabama is that of security: women, says the Alabama Board of Corrections, cannot perform adequately as prison guards because they are too physically weak,** and would *inevitably* disrupt inmates of a male prison. (The latter is alleged to be a matter of "innate recognition.") Brief of Appellants at 50, 51.

What may be intuitively obvious to the Alabama Board of Corrections however is not so clear to the Washington Division of Adult Corrections. In its petition to the Washington State Human Rights Commission for the declaratory ruling on prison guards, the Division of Adult Corrections of Washington State Department of Social and Health Services did not advance any argument except privacy—and that in a limited context. See discussion, §I, *supra*. In fact at the hearing on the petition, Mr. Harold B. Bradley, Director of the Division, testified that women guards in Washington prisons do and will perform the same duties as do males, and he opposed the security argument presented by

*See Appendix B for text of regulations.

**It is interesting in this context that the height and weight requirements imposed by Alabama for the job of prison guard are 5'2" and 120 lbs. Title 55, §373 (109), Code of Alabama (194) (Recomp. 1958). Presumably then, any man 5'2" tall and weighing 120 lbs. is better qualified than any woman whatever her size and weight.

the Union. This testimony was noted and relied upon by the Commission in its ruling. Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 6. At that hearing the "security" argument was urged by representatives of the Washington Federation of State Employees, which represents the (mostly male) prison guards in Washington institutions. The Commission rejected the argument as based on sex stereotypes, and reminded the Union that the law against discrimination requires that individuals be treated as individuals and not as members of a general class. Declaratory Ruling No. 19, *supra*, at 6. In this ruling the Commission was guided by its earlier ruling that being male was not a bona fide occupational qualification for guard and patrol personnel:

> But it is not, in our judgment, necessary that your personnel be male. In a ruling on a sex-discrimination case, *Weeks v. Southern Bell Telephone and Telegraph Company*, 508 F.2d 228, in finding that discrimination had been practiced in employment aganst a woman, the court stated:
>
> "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."
>
> We draw on this principle in emphasizing that whether persons can sufficiently defend themselves from assault, whether sexual or otherwise physical, is an individual judgment,

based upon individual capabilities. The issue is training, skill, and knowledge. A poorly trained male will perform just as ineptly as a poorly trained female; the converse is also true, that females with adequate instruction can fulfill the requirements of the job with competence.

But even if, percentage-wise, less women are capable of performing security-related duties than are men, this is no justification for discrimination. Persons are still to be treated as individuals so that they are not bound by the limitations or stereotype roles of their particular identity group, be it racial, sexual, or other.

Washington State Human Rights Commission Declaratory Ruling No. 12, 1 Washington Human Rights Reporter IC-17, 18, 19 (September 1974).

Thus on two occasions the Washington State Human Rights Commission has considered the other bona fide occupational qualification question presently before this Court, that of security, and has held each time that individual capabilities, not sex, must be the determinant. Appellants at bar are in the awkward position of arguing that no woman of any size or experience or training is capable of adequate performance as an Alabama prison guard. They argue against reality.

CONCLUSION

Based on its own experience in determining comparable problems under the law of the State of Washington, the Washington State Human Rights Commission believes that the district court decided this case correctly. It urges affirmance.

Respectfully submited,

SLADE GORTON,
Attorney General

MORTON M. TYTLER,
Senior Assistant Attorney General for the Washington State Human Rights Commission

ANNE L. ELLINGTON,
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APPENDIX A

TEXT OF RELEVANT STATUTES

Revised Code of Washington 34.04.080
Revised Code of Washington 49.60.010
Revised Code of Washington 49.60.030
Revised Code of Washington 49.60.120
Revised Code of Washington 49.60.180
Title 55, 373(109), Code of Alabama (1940) (Recomp. 1958)

34.04.080 Declaratory ruling by agency——Petition——Court review. On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the superior court of Thurston county in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. [1959 c 234 § 8.]

49.60.010 Purpose of chapter. This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the

provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap; and the board established hereunder is hereby given general jurisdiction and power for such purposes. [1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

49.60.030 Freedom from discrimination——Declaration of civil rights. (1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions without discrimination: *Provided however*, That different insurance rates may be continued and/or applied on the basis of sex when bona fide statistical differences in risk or exposure are substantiated.

(2) Any person deeming himself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover the actual damages sustained by him, or both, together with the cost of suit including a reasonable attorney's fees or any other remedy authorized by this chapter or the United States Civil Rights Act of 1964; and

(3) Notwithstanding any other provisions of this chapter, any act prohibited by this chapter related to sex discrimination which is committed in the course of trade or commerce in the state of Washington as defined in the Consumer Protection Act, chapter 19.86 RCW, shall be deemed an unfair practice within the meaning of RCW 19.86.020 and subject to all the provisions of chapter 19.86 RCW as

now or hereafter amended. [1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2; Rem. Supp. 1949 § 7614-21.]

49.60.120 Certain powers and duties of board. The board shall have the functions, powers and duties:

(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter, and the policies and practices of the board in connection therewith.

(4) To receive, investigate, and pass upon complaints alleging unfair practices as defined in this chapter because of sex, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(5) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, race, creed, color, national origin, marital status, age, or the presence of any sensory, mental, or physical handicap.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies. [1973 1st ex.s c 214 § 4; 1973 c 141 § 7; 1971 ex.s. c 81 § 1; 1957 c 37 § 7; 1955 c 270 § 8. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

49.60.180 Unfair practices of employer defined. It is an unfair practice for any employer:

(1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided*, That it shall not be an unfair practice for an employer to segregate washrooms or

locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the board by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language. [1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

CODE OF ALABAMA

TITLE 55, § 373(109)

(1940) (Recomp. 1958)

Minimum standards for applicants and appointees as law-enforcement officers; employment of applicants; qualifications. — The minimum standards hereafter in this section provided shall apply to applicants and appointees as law-enforcement

officers who are not law-enforcement officers in the state on the effective date of this article and to applicants and appointees who, though law-enforcement officers on the effective date of this article, cease to be law-enforcement officers before making application for employment as a law-enforcement officer or being employed as a law-enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on the effective date of this article a law-enforcement officer and who continues until the date of his application as a law-enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(a) Age.—The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(b) Education.—The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(c) Police training.—Prior to appointment, the applicant shall have completed at least 240 hours of formal police training, in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the Commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 9 months after provisional appointment and should he fail to complete such training, his appointment shall be null and void.

(d) Physical qualifications. — The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(e) Character.—The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the

area in which the applicant proposes to serve as a law-enforcement officer attesting his good reputation.

The foregoing requirements shall not apply to any person who is presently employed as a law-enforcement officer in the state and who continues to be so employed when he makes application for or is employed as a law enforcement officer in a different capacity or for a different employer. (1971, No. 1981, p. 3227, § 7, appvd. Sept. 20, 1971; 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

APPENDIX B

TEXT OF REGULATIONS

Washington Administrative Code 162-08-620
Washington Administrative Code 162-16-030
Administrative Regulation 204, Alabama Board of Corrections

WAC 162-08-620 DECLARATORY RULINGS.

(1) **Petition.** Petitions for declaratory rulings under RCW 34.04.080 shall contain the following:

(a) A statement of the question on which the declaratory ruling is sought;

(b) A full statement of the facts giving rise to the question;

(c) A statement of the basis for the petitioner's interest in the question.

(2) **Confirmation, Investigation.** In order to determine the full facts giving rise to the question the board may require the petitioner to submit additional information, and it may make an independent investigation.

(3) **Consideration and Disposition.** When the board is satisfied that it understands the question on whch the declaratory ruling has been sought, it shall:

(a) Issue a nonbinding declaratory ruling;

(b) Notify the petitioner that no declaratory ruling will be issued; or

(c) Set a time and place for hearing argument on the question, notify the petitioner of them, and issue either a binding or nonbinding declaratory ruling after the hearing.

WAC 162-16-030 ADVICE OF COMMISSION. When requested to do so, the commission's staff will advise persons on how to meet particular employment needs consistently with the law against discrimination. In order to be safe, persons are advised to petition the commission for a declaratory ruling (see WAC 162-08-620) before proceeding to consider race, creed, color, national origin, age, sex, marital status, or handicap to be a bona fide occupational qualification in particular circumstances, unless the commission or another public agency with comparable jurisdiction has directed or authorized the action.

Administrative Regulation 204, Alabama Board of Corrections

Selective Certification
Correctional Counselor I Positions

I. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactorily completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000c of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5. Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filed which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certifi-

cation and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedures established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect

the power of the Commissioner to hire or discharge any employee.

V. REFERENCES

12. Title 45-2000c, United States Code

13. Letter from the General Council of the Equal Employment Opportunity Commission.

APPENDIX C

TEXT OF DECLARATORY RULINGS

Washington State Human Rights Commission Declaratory Ruling #10, 1 Washington Human Rights Reporter IC-14 (June 1974)

Washington State Human Rights Commission Declaratory Ruling #12, 1 Washington Human Rights Reporter IC-17 (Sept. 1974)

Washington State Human Rights Commission Declaratory Ruling #13, 1 Washington Human Rights Reporter IC-19 (Jan. 1975)

Washington State Human Rights Commission Declaratory Ruling #15, 1 Washington Human Rights Reporter IC-28 (Mar. 1975)

Washington State Human Rights Commission Declaratory Ruling #16, 1 Washington Human Rights Reporter IC-30 (June 1975)

Washington State Human Rights Commission Declaratory Ruling #17, 1 Washington Human Rights Reporter ..... (Feb. 1977)

Washington State Human Rights Commission Declaratory Ruling #19, 1 Washington Human Rights Reporter ..... (Feb. 1977)

DECLARATORY RULING NO. 10

JUNE 18, 1974

Sex as a Bona Fide Occupational Qualification for Locker Room Equipment Clerks. Being male or female is a bona fide occupational qualification for locker room equipment clerks.

TO: Mary Robinson, Affirmative Action Officer
Western Washington State College
Bellingham, Washington 98225

You have asked for a declaratory ruling on whether being male or female is a bona fide occupational qualification for locker room equipment clerks. You explain (by copy of memorandum by Chairperson of Western Washington State College's Department of Physical Education) that persons performing as equipment clerks must carry out their duties inside and/or adjacent to the men's or women's gymnasium locker and shower areas. You mention that "standards of propriety" would prevent a male from being an equipment clerk in the women's locker and shower areas and vice versa for a woman in the men's areas.

R.C.W. 49.60.180 says:

> It is an unfair practice for any employer: (1) to refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification.

It would appear that the performance of the equipment clerk's duties would require that person to be present in the men's or women's locker and

shower area when such areas are in use. Community standards and respect for privacy require that a woman be free from the presence of members of the opposite sex during the use of locker room and shower room facilities and the same, of course, applies to men. This basic privacy consideration is discussed generally in the Law Against Discrimination with respect to terms and conditions of employment where it says that "it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex." R.C.W. 49.60.180(3).

It is therefore the ruling of this Commission that being male or female is a bona fide occupational qualification for locker room equipment clerks, where there exists a compelling concern for protection of personal privacy.

Having so ruled, we direct your attention to WAC 162-16-040, which reads:

> **WAC 162-16-040** IDENTIFICATION IN USE. Inquiries or specifications of race, creed, color, national origin, age, sex, marital status, or handicap should always be accompanied by a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice.

It is important to comply with this section whenever you specify employees of one sex or other to employment agencies, in advertisements, job announce-

ments, or elsewhere. The absence of such an explanation will cause needless work for you and for us responding to questions and complaints. We suggest using words such as the following:

> Being male or female is a lawful job qualification for locker room equipment clerks, Washington State Human Rights Commission Declaratory Ruling No. 10.

DECLARATORY RULING NO. 12

SEPTEMBER 19, 1974

Sex is not a Bona Fide Occupational Qualification for Guard or Patrol Personnel. Being male is not a bona fide occupational qualification for guard or patrol personnel.

TO: Mr. C. B. Pennington
Surrey Patrol System
308 Jones Building
Third and Union
Seattle, Washington 98101

You have asked for a declaratory ruling on whether being male is a bona fide occupational qualification for guard and patrol personnel. You explain:

> Very briefly, the dangers involved in our present work are of such nature that I—or you—wouldn't think of exposing our daughters or spouses to the physical crippling—or death—exposure involved; and in the case of females, the added possibility of rape.
> Also involved are the weather conditions our personnel must include as part of the conditions of their employment.

> Our present activities provide for our personnel being alone at their patrol duties and guard posts which increases the exposure of physical injury. Our requirement for frequent check-ins only alert us, that in the case of a check-in not being received, it is time to investigate.
> We are actively seeking those security positions of the type we could fill with persons, without the future possible criticism, which your office and agency would have to share, that we were negligent and "knew" or "should have known" the risks involved.

R.C.W. 49.60.180 says:

> It is an unfair practice for any employer:
> (1) To refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification.

The term "bona fide occupational qualification" is discussed and partially defined in WAC 162-16-020.

Your business is to provide security personnel, who at times may be exposed to physical danger, whether they are male or female. It is, therefore, important that your staff receive adequate training and be properly equipped.

But it is not, in our judgment, necessary that your personnel be male. In a ruling on a sex-discrimination case, *Weeks v. Southern Bell Telephone and Telegraph Company*, 508 F. 2d 228, in finding that discrimination had been practiced in employment against a woman, the court stated:

> The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

We draw on this principle in emphasizing that whether persons can sufficiently defend themselves from assault, whether sexual or otherwise physical, is an individual judgment, based upon individual capabilities. The issue is training, skill, and knowledge. A poorly trained male will perform just as ineptly as a poorly trained female; the converse is also true, that females with adequate instruction can fulfill the requirements of the job with competence.

But even if, percentage-wise, less women are capable of performing security-related duties than are men, this is no justification for discrimination. Persons are still to be treated as individuals so that they are not bound by the limitations or stereotype roles of their particular identity group, be it racial, sexual, or other.

It is therefore the ruling of this Commission that being male is not a bona fide occupational qualification for guard and patrol personnel, from the standpoint of physical capability or exposure to physical harm.

With respect to your argument regarding weather conditions endured by your personnel, no evidence has been presented (nor do we believe any exists) which would support a position that weather affects women in an exceptionally adverse way. Accordingly, it our ruling that being male is not a bona fide occupational qualification for guard and patrol personnel from the standpoint of exposure to weather conditions.

DECLARATORY RULING NO. 13

JANUARY 16, 1975

Sex as a Bona Fide Occupational Qualification for Clothing Sales Job to Protect Personal Privacy. Being female is a bona fide occupational qualification for clothing sales jobs to protect personal privacy at a "fashion party" where women's clothes are taken off and put on in the presence of others.

TO: Marie Bromgard
917 S. Fifth Avenue
Yakima, Washington 98902

You have asked for a declaratory ruling on whether being female is a bona fide occupational qualification for sales personnel for Beeline Fashions. You state that the nature of the sales work involves appearing at "fashion parties" where women try on and style your women's clothing fashions. You further contend that the presence of male sales personnel would be inhibiting and embarrassing to your customers.

R.C.W. 49.60.180 says:

> It is an unfair practice for any employer:
> (1) To refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification.

The term "bona fide occupational qualification" is discussed and partially defined in WAC 162-16-020 which says that one area recognized for bona fide occupational qualification is:

> (2) (a) Where a person's race, creed, color, national origin, age, *sex*, marital status, or handicap will be essential to, or will contribute to, the accomplishment of the purposes for which the person is hired. (Emphasis added)

We tend to agree with your position that the presence of male sales personnel may have an adverse impact upon the conduct of a "fashion party" where women's clothes are taken off and put on in the presence of others. We must stipulate, however, that being female, in this context, is a bona fide occupational qualification for sales personnel only if it is not reasonably practicable to have the female customers remove themselves to another room for the purpose of dressing and undressing.

Our concern here is for protection of personal privacy. If it is common for your customers to dress in private and then model their clothing in a group setting, then it would be our opinion that males are capable of performing the sales job. If, however, the dressing is done in front of the group, then we would rule such a setting to be one in which being female is a bona fide occupational qualification. We make this ruling cautiously, however, and emphasize that the burden is on the employer to show that no reasonable alteration of operations could occur which

would eliminate the need for employing only one sex.

Having so ruled, we call your attention to WAC 162-16-040, which reads:

> IDENTIFICATION IN USE. Inquiries or specifications of race, creed, color, national origin, age, *sex*, marital status, or handicap should always be accompanied by a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice. (Emphasis added)

Should you feel that the facts of your situation fall within our above stated position and you wish to exert a claim of bona fide occupational qualification, it is important to comply with this section whenever you specify employees of one sex or another in advertisements and solicitations for employment applicants. The absence of such an explanation will result in misunderstandings. We suggest using words such as the following:

> Being female is a lawful job qualification for this position under the guidelines of Washington State Human Rights Commission Declaratory Ruling No. 13.

DECLARATORY RULING NO. 15

MARCH 20, 1975

Sex is not a Bona Fide Occupational Qualification for Community Hosting Personnel. Being female is not

a bona fide occupational qualification for community hosting personnel.

TO: Ronald W. Freeman, Manager
Newcomers Service of Tacoma
Box 44414
Tacoma, Washington 98444

You have asked us to rule whether being female is a bona fide occupational qualification for your hosting personnel under R.C.W. 49.60.180, the Washington State Law Against Discrimination. Your business involves the welcoming of new residents of your area.

In your letter of March 3, 1975, you state several reasons for wanting to hire only females and we summarize the reasons as follows:

(1) Your business is designed to "reach the average housewife, who generally does the family shopping."
(2) "Housewives always have something in common * * * and therefore sets a comfortable atmosphere in which our hostesses can best present our sponsors in the most favorable light possible."
(3) "Our hostesses make calls as early as 8:30 a.m. when women are still in their robes, and in the evening when it is dark. Therefore, Newcomers Service feels that a male hostess would cause considerable suspicion as to motive, as well as embarrassment to our newcomer housewives, and reflect extremely poor taste * * *"
(4) As a part of your training program, your

hosting personnel are instructed on the use of certain cosmetics and skin care and are instructed regarding bra fittings. Currently your instruction includes having the trainee sample these products. The same as above occurs with respect to hairdressing. The purpose of this training is, as you say, to familiarize the hosting personnel with the products of the businesses you represent, so that they may recommend these products to new residents.
You state that certain "equipment such as breasts and hair * * * is vital to our *training program*." (Emphasis added)

R.C.W. 49.60.180 says, in relevant part:

It is an unfair practice for any employer:
(1) To refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification

Information concerning the Commission's view of bona fide occupation qualification is contained in WAC 162-16-020.

As a general rule, the courts and the Commission have held that the term "bona fide occupational qualification" must be narrowly construed so as to make lawful discrimination the exception to the rule, rather than the rule itself. Examples of situations jusifiably involving sex as a bona fide occupational qualification are those involving the need for authenticity (such as in entertainment and modeling) and the need for personal privacy. A bona fide occupa-

tional qualification would not exist in the above or other circumstances, however, if there could occur a reasonable alteration of the employer's practices which would eliminate the need to discriminate.

It is our opinion, after having examined your arguments, that:

(a) With respect to your argument, number (2) above, customer preference is not a legitimate grounds for discrimination from the standpoint of setting a comfortable atmosphere; nor do we agree that all housewives have something in common to the extent that this would justify discrimination against males (or females who are not housewives). If it is true that your customers would feel more comfortable with persons of their own sex, this is probably the result of a long tradition of discrimination which the law now forbids. This situation is analogous to the argument of a customer who desires to be served by only persons of one race;

(b) With respect to argument (3), we suggest that this problem could be alleviated through the use of publicity, advanced telephone calls, and proper identification. We recognize and appreciate your legitimate need to hire persons of the highest moral character for these positions, but we do not feel moral character is discerned on the basis of a person's sex.

(c) With respect to argument (4), we believe that your instructional methods could be reasonably changed to adequately train

male personnel in selling the mentioned products, particularly since only a few of your products are substantially sex-related. Further, we note that your mention of concern for personal privacy arises only during the training program and not during the course of carrying out hosting work.

We believe that the problems you cite are those of adaptation, not sex, and it is therefore our ruling that being female is not a bona fide occupational qualification within the meaning of the law for your community hosting personnel.

DECLARATORY RULING NO. 16

JUNE 26, 1975

Sex is a Bona Fide Occupational Qualification for College Residence Hall Custodians. Sex is a bona fide occupational qualification to the extent necessary to make available custodians of both sexes for the maintenance of private areas in residence halls.

TO: Robert C. Cook
Staff Human Rights Officer
Department of Personnel Services
116 Lewis Hall DW-70
University of Washington
Seattle, Washington

You have asked us to rule whether sex is a bona fide occupational qualification (BFOQ) for residence hall custodians. You quote the following description of a custodian's job:

Presently, male custodians are cleaning either or both male and female bathrooms, and female

> custodian are doing the same. We are beginning to have complaints from residents regarding the assignment of a male custodian to a female bathroom or vice versa. • • •

Your concern is for the need to employ persons on the basis of sex in order to protect the personal privacy of those living in the residence halls.

R.C.W. 49.60.180 makes it an unfair practice to discriminate against persons in employment unless based upon a bona fide occupational qualification. The Commission's general approach to interpreting the "BFOQ" provision is explained in WAC 162-16-020 and WAC 162-16-130. You have also stated your awareness of previous declaratory rulings of the Commission which recognize sex as a BFOQ where necessary to protect personal privacy.

We again restate our position that the Law Against Discrimination permits sex being considered as a BFOQ where it is necessary to protect personal privacy and where no reasonable alteration of an employer's practice could occur which would eliminate a need to discriminate. With specific reference to the situation that you bring before us, that of residence hall custodians, we would rule that sex is a BFOQ provided that:

(1) A necessary and significant portion of a custodian's job is to clean in areas where persons are normally and necessarily disrobed, i.e., shower and bath rooms;

(2) No reasonable alteration of the physical characteristics of the building could occur

which would eliminate the need to discriminate;

(3) No reasonable alteration in the scheduling of the usage of the private areas in question could occur which would eliminate the need to discriminate;

(4) No reasonable alteration of the scheduling of the custodial force could occur which would eliminate the need to discriminate;

(5) The BFOQ applies only to those custodial positions for which a major portion of the work involves cleaning private areas;

(6) The BFOQ applies only to the extent necessary to make available in the custodial workforce the minimum numbers of males and females required to accomplish the cleaning of the halls.

It is our interpretation of the law that, whenever possible, it is required that the University first explore all possible methods of carrying out the maintenance of residence halls short of considering sex to be a BFOQ. For example, if it is possible to interrupt the usage of a particular restroom or bathing area for the period required to clean it, then such should be done, rather than resort to the employment of persons of only one sex. Similarly, if it is possible to rearrange the scheduling of the existing workforce in order to provide coverage for the private areas in question without resorting to the use of the BFOQ exemption in the law, then such should, as a matter of law, be the first action taken. And, of course, the

BFOQ exemption should apply only to certain custodial positions, not to all.

Having recognized the legitimate application of the BFOQ provision of the law, within limitations, to the employment of residence hall custodians, we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be a BFOQ in hiring when it is merely necessary to assign persons of one sex or the other to a particular task. But where there are inadequate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial measure.

Having so ruled, should you determine that the circumstances of your residence halls justify application of the BFOQ principle, we direct you to WAC 162-16-040,130, and 140 for information on the solicitation of employment applicants and job orders.

DECLARATORY RULING NO. 17

JULY 15, 1976

Sex is a Bona Fide Occupational Qualification for Intimate Bodily Care. Being male or female is a bona fide occupational qualification for intimate bodily care but only to the extent necessary to maintain an adequate balance of males and females in the workforce to carry out the necessary functions.

TO: Ms. Jan Rosbach
Affirmative Action Officer
Washington State Department of Personnel
Box 1789
Olympia, Washington 98504

By letter of June 29, 1976, you have asked for a declaratory ruling on whether being male or female is a bona fide occupational qualification, at certain times, for the hiring of Attendant Counselor I positions at the Cerebral Palsy Center at Rainier School, Buckley, Washington. This ruling is given under the provisions of WAC 162-08-620 and R.C.W. 34.04.080. We quote from your letter as follows:

> The Cerebral Palsy Center at Rainier School has a current population of 38 patients, 19 males and 19 females. This unit provides care for patients through 20 years of age.
>
> Many of the older patients (15-20 years) have voiced concern regarding the practice of persons of the opposite sex providing bathing, toileting, and dressing care. This has caused a great deal of embarrassment to these patients. I am requesting that the Rainier School be allowed to hire specifically men or women for Attendant Counselor I positions within the Cerebral Palsy unit in order to maintain a balance when necessary to provide sufficient care of patients who object to persons of the opposite sex attending their personal needs.
>
> The staffing differs from that of a regular hospital or nursing home in that the persons providing this type of care are not medically trained. The minimum qualifications of an Attendant Counselor I require only completion of 8th grade of school and allows for the substitution of experience in practical nursing or child care for the education.

The Washington State Law Against Discrimi-

nation makes it an unfair practice to discriminate in employment on the basis of sex and other grounds, "unless based upon a bona fide occupational qualification." R.C.W. 49.60.180(1). The Commission's general approach toward interpretating the "bona fide occupational qualification (BFOQ)" provision of the law is contained in Chapter 162-16 WAC. We consider your request to present to us two issues for determination:

(1) whether sex is a BFOQ in the hiring of Attendant Counselor I's from the standpoint protecting personal privacy; and,

(2) to what extent is an exercise of the BFOQ provision of the law necessary to accomplish your business necessities?

The Commission has held on numerous occasions that sex is a BFOQ when necessary for "maintaining conventional standards of sexual privacy", and where it is "essential to the accomplishment of the purposes of the job." WAC 162-16-130. The BFOQ provision may be applied, however, only when the employer is able to meet the burden of proving that "no reasonable alteration of operations could occur which would eliminate the need for employing only one sex." Declaratory Ruling No. 13 (January 16, 1975). On questions of sex being a BFOQ to protect personal privacy, the Commission has ruled that such is a proper application of the law for locker room equipment clerks, Declaratory Ruling No. 10 (June 20, 1974), for intimate apparel fitters, Declaratory Ruling No. 13 (January 16, 1975) and for residence hall custodians who work in private residence areas, Declaratory Ruling No. 16 (June 26, 1975).

We consider your request to pose questions which are similar to those raised in Declaratory Ruling No. 16. In that case, the petitioner (the University of Washington) stated that a certain number of both males and females were required in the custodial workforce to carry out maintenance functions in private areas of the residences, bathrooms, etc. We quote the following portions of that ruling, which are applicable in principle to the case now before us:

> We again restate our position that the Law Against Discrimination permits sex being considered as a BFOQ where it is necessary to protect personal privacy and where no reasonable alteration of an employer's practice could occur which would eliminate a need to discriminate. With specific reference to the situation that you bring before us, that of residence hall custodians, we would rule that sex is a BFOQ provided that:
>
> (1) a necessary and signficant portion of a custodian's job is to clean in areas where persons are normally and necessarily disrobed, i.e., shower and bath rooms;
> (2) * * *
> (3) * * *
> (4) no reasonable alteration of the scheduling of the custodial force could occur which would eliminate the need to discriminate;
> (5) the BFOQ applies only to those custodial

positions for which a major portion of the work involves cleaning private areas;

(6) the BFOQ applies only to the extent necessary to make available in the custodial workforce the minimum numbers of males and females required to accomplish the cleaning of the halls.

It is our interpretation of the law that, whenever possible, it is required that the University first explore all possible methods of carrying out the maintenance of residence halls short of considering sex to be a BFOQ. For example, if it is possible to interrupt the usage of a particular restroom or bathing area for the period required to clean it, then such should be done, rather than resort to the employment of persons of only one sex. Similarly, if it is possible to rearrange the scheduling of the existing workforce in order to provide coverage for the private areas in question without resorting to the use of the BFOQ exemption in the law, then such should, as a matter of law, be the first action taken. And, of course, the BFOQ exemption should apply only to certain custodial positions, not to all.

Having recognized the legitimate application of the BFOQ provision of the law, within limitations, to the employment of residence hall custodians, we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be a BFOQ in hiring when it is merely necessary to assign persons of one sex or the other to a particular task. But where there are inade-

quate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial measure. Declaratory Ruling No. 16, *supra*.

The circumstances of your request, we recognize, would vary from the above situation in that the service and care rendered by the Attendant Counselor I's is uniquely intimate, in fact, involving contact with and view of the intimate portions of a client's anatomy. This fact, it is our ruling, therefore justifies sex as a bona fide occupational qualification, within the same limitations as were applied in Declaratory Ruling No. 16. Specifically, our permission to apply the BFOQ provision covers only those positions which involve a large degree of intimate bodily care and where the patient or client would object to services being rendered by a member of the opposite sex. Further, you must first attempt to accomplish the necessary personal care functions by rearranging the scheduling of personnel, without applying the BFOQ exception to the general rule on non-discrimination.

The central issue in this case, as it was in Declaratory Ruling No. 16, we emphasize, is the need to make available the minimum number of workers of both sexes to enable the employer to make the necessary work assignments for carrying out sex-related private functions. It is not permissible to, in all cases, specify the sex of the person to be hired. It is permissible to do so in order to maintain a proper balance

of male and female employees, when business necessity so requires. Such a scheme will not detract from the employment opportunities of either males or females, and such a practice is condoned by the Law Against Discrimination, which states:

> That is shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the board by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes. R.C.W. 49.60.180(3).

Having so ruled, we direct your attention to, and require compliance with, as a condition of this ruling, WAC 162-16-040, which reads:

> IDENTIFICATION IN USE. Inquiries or specifications of race, creed, color, national origin, age, sex, marital status or handicap should always be accompanied with a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice.

To avoid misunderstandings on the part of the public and job applicants, we suggest that the following language be used in job orders, announcements, and descriptions:

> Being male (or female) is a bona fide occupational qualification for certain Attendant Counselor I positions, under Washington State Human Rights Commission Declaratory Ruling No. 17.

DECLARATORY RULING NO. 19

Employment/Sex Discrimination: Sex is a bona fide occupational qualification in the assignment of correctional officers to protect personal privacy, within limitations.

Employment/Sex Discrimination: Sex is a bona fide occupational qualification in the hiring of correctional officers only to the extent required to make available adequate numbers of workers of a particular sex to carry out privacy-related assignments.

To: Harold B. Bradley, Director
Adult Corrections Division
Washington State Department of
Social and Health Services
Olympia, Washington 98504
and
George E. Clark, Chief
Office of Minority Affairs/Affirmative Action
Washington State Department of
Social and Health Services
1700 East Cherry Building
Seattle, Washington 98122

You have petitioned for a declaratory ruling under the provisions of RCW 34.04.080 and WAC

162-08-620 on "whether being male or female is a bona fide occupational qualification at certain times and in certain places for the hiring of correctional staff in adult correctional institutions." The Commission has considered your letter of September 28, 1976 and other written material and has reviewed the November 1, 1976 letter from counsel for the Washington Federation of State Employees. Oral argument was heard on this matter from both the petitioners and the employee union on January 20, 1977, at which time the latter submitted affidavits of three correctional officers. This is a binding declaratory ruling.

> Your letter of September 28, 1976 states, in part:
> "* * * In order to maintain security present institutions were constructed to provide surveillance which allows no privacy in the cells, lavatories, or shower rooms. Staff must carry out duties inside or adjacent to these open facilities and also must perform searches of residents, requiring intimate contact with, and view of residents' anatomies.
> "Residents are placed in adult correctional institutions by court order and cannot exercise personal choice in the living arrangements imposed upon them. Community standards of respect for privacy require that individuals be free from the presence of the opposite sex while taking off and putting on clothes, using toilet facilities, and showering. Recognizing the residents' personal dignity and right to maintain conventional standards of personal privacy, we request

> that sex be a bona fide occupational qualification in areas where persons are normally and necessarily disrobed.
> "Application of bona fide occupational qualifications will be monitored by a committee composed of Adult Corrections Division staff and Office of Minority Affairs/Affirmative Action staff. The committee has made an intensive study of each institution including the posts and duties of the correctional staff and will ensure the use of BFOQ's where:
>
> 1. No reasonable alteration of the physical characteristics of the building or of program operation could eliminate the need to discriminate;
> 2. It is necessary to provide in a particular location the minimum number of males or females required to provide the personal privacy for the residents;
> 3. It is essential to the accomplishment of the purpose for which the person is hired.
>
> "The committee will conduct annual reviews to determine if conditions and circumstances continue to warrant the application of BFOQ's."

GENERAL APPROACH

The Law Against Discrimination makes it an unfair practice to discriminate in employment on the basis of sex (and other grounds), "unless based upon a bona fide occupational qualification." RCW 49.60-.180(1). See WAC Chapter 162-16 for our general approach to the bona fide occupational qualification portion of the law.

Consistent with our view that this particular exemption from the general rule of non-discrimination should be narrowly construed, we have held sex to be a bona fide occupational qualification (BFOQ) when necessary for "maintaining conventional standards of sexual privacy" and where it is "essential to the accomplishment of the purposes of the job." WAC 162-16-130. The burden of proof is on the employer in such cases to show that "no reasonable alteration of operations could occur which would eliminate the need for employing only one sex." Declaratory Ruling No. 13, 1 WHRR IC-19 (January 16, 1975); Declaratory Ruling No. 17, 1 WHRR IC-32 (July 15, 1976). Such a showing would make considerations of sex a "business necessity." Declaratory Ruling No. 17, *supra*, at IC-35.

PRIVACY

It is our ruling in this matter that sex may be considered in the employment of adult correctional personnel where necessary to protect the personal (physical) privacy of the residents.* The limitations of this ruling are described herein.

As you have stated, persons are involuntarily committed to the state's correctional institutions. Their living conditions are controlled by the state. Hence, the state must assume responsibility for ensuring the health, safety, and dignity of the institu-

*This ruling addresses employment in areas "where persons are normally and necessarily disrobed", as stated in your letter of September 28, 1976, and extends only to those situations where considerations of sex is necessary to protect inmate privacy and where no alternatives exist, as explained herein.

tions' residents. Protection from invasion of personal privacy is essential to the dignity of those within male and female correctional institutions and in the particular setting becomes an extremely valuable commodity.

WORK ASSIGNMENTS

We conclude that the personal privacy rights of the residents justify the consideration of the sex of employees in making work assignments within the institutions. Every effort must be made, however, to minimize the need for sex-based work assignments, since such distinctions may restrict the opportunities of members of a particular sex to obtain diversified work experience. The "business necessity" standard should be met in establishing the need to make sex-based work assignments, including a showing that no reasonable operational alternatives exist. Such alternatives as restructuring job duties, altering work schedules, and modifying programs and physical structures must be explored and are preferred as alternatives to sex-based work assignments. Our ruling permits consideration of sex in setting work assignments only in connection with positions where the issue of personal privacy affects necessary and major portions of the job duties in question after a thorough job-by-job analysis. Additionally, our holding is based upon the requirement that an equal standard of personal privacy be enforced in both male and female correctional institutions.

PROMOTIONAL OPPORTUNITIES

We are authorized to permit that terms and conditions of employment be based upon sex when we find the practice "to be appropriate for the practical realization of the equality of opportunity between the sexes." RCW 49.60.180(3). Sex-based work assignments fall within the coverage of this provision of the law if the effect of the practice is to ensure equal opportunity in all aspects of employment.

Specifically, it is our ruling that the sex-based assignment scheme in question must not limit the work experience of members of a particular sex in a manner that would adversely affect promotional opportunities. Nor should it adversely affect other terms and conditions of employment. To restrict the work experience of members of a particular sex and then punish them in career advancement for their lack of experience would clearly conflict with the purposes of the law and with the "practical realization of equality of opportunity between the sexes."

HIRING

Having ruled that sex may be considered in the assignment of correctional personnel (within limitations), we turn to the issue of the legality of hiring limitations or specifications based upon sex. We have addressed this issue before in situations posing similar questions of law:

> "* * * we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be

> a BFOQ in hiring when it is merely necessary to assign persons of one sex or the other to a particular task. But where there are inadequate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial (hiring) measure." Declaratory Ruling No. 16, 1 WHRR IC-32 (June 26, 1975); quoted agai.. in Declaratory Ruling No. 17, *supra*, at IC-34.

As succinctly stated in our ruling on "Attendant Counselor" positions at the state cerebral palsy center:

> "It is not permissible to, in all cases, specify the sex of the person to be hired. It is permissible to do so in order to maintain a proper balance of male and female employees, when business necessity so requires." Declaratory Ruling No. 17, *supra*, at IC-35.

It is our determination in connection with this petition that sex may not be considered a BFOQ in the hiring of correctional staff, except when necessary as a short term and remedial hiring measure within the above described conditions, and only when customary hiring methods will fail to produce an adequate sexual mix of employees. In any event, we can find no justification for excluding members of either sex from applying for employment at a correctional institution and being placed on a register of available qualified applicants.

Our ruling is intended to apply to the circumstances presented in this petition for declaratory rul-

ing and is not a determination of corrective employment measures which may be appropriate under WAC Chapter 162-18.

UNION'S ARGUMENTS

We have permitted argument on the petition from the Washington Federation of State Employees as a "friend of the Commission" in the interest of resolving related issues in the same forum at the same time. In summary, the Federation objects to the hiring of women as correctional officers at male correctional institutions for the following reasons:

(1) Women are incapable of or unlikely to respond to acts of violence occuring within the male institutions;

(2) Women will be assigned to less than the full range of duties of male correctional officers and will draw the same pay; and,

(3) Women correctional officers would be assigned to areas where contact with inmates is limited, thus restricting the ability of males with more seniority to bid on such jobs.

The first issue is easily disposed of by the principles cited in our previous ruling involving the employment of women as guard and patrol personnel. Declaratory Ruling No. 12, 1 WHRR IC-17 (September 19, 1974). There we stated that proper training is more important than the sex of persons employed in positions involving potential physical harm. In ruling that being male was not a bona fide occupational qualification, we held:

> "A poorly trained male will perform just as ineptly as a poorly trained female; * * *
> "But even if, percentage-wise, less women are capable of performing security-related duties than are men, this is no justification for discrimination. Persons are still to be treated as individuals so that they are not bound by the limitations or stereotpye roles of their particular identity group * * *"

The same applies to the instant matter.

The second assertion of the Federation conflicts with the statement of petitioner Bradley during oral argument that women will be expected to perform within the applicable job description on the same basis as males. The fact that tasks which invade a prisoner's physical privacy will not be carried out by women in the male institutions, nor by men at women's institutions, does not significantly affect the comparability of work. Equal opportunity between the sexes carries with it equal responsibility, a concept left intact by this ruling.

The third argument of the Federation, it would appear, can be reduced to a statement that either women should perform all work assignments associated with the duties of a correctional officer (including those in "private" areas), or they should not be hired at all. To exercise discretion in the placement of women in non-private areas would, as we understand the union's position, interfere with the seniority bidding rights of male employees. Specifically, the non-private positions to which women would be

assigned are some of the most desirable jobs, according to the union.

The Federation's all-or-nothing approach to the hiring of women and the position of the petitioners are inconsistent and the two must be reconciled. We have already held that sex-based work assignments are permissable under the law in certain cases. Therefore, in addressing the Federation's arguments we may rule that women should be hired to the fullest extent possible and that inconsistent collective bargaining rights or customs in bidding for jobs must be adjusted so as not to interfere with the realization of equal employment opportunity. Or, in the alternative, we may adopt the union's position and rule that no women are to be hired. It should be obvious that the former is the only appropriate choice before us. Any other holding would cause women to suffer a denial of their civil rights, in blatant disregard of the purpose of the Law Against Discrimination.

Whether or not the collective bargaining agreement provides guarantees on work assignments to those with the most seniority is not a determination that we must reach. A collective bargaining agreement is superceded by inconsistent provisions of the Law Against Discrimination. Declaratory Ruling No. 14, 1 WHRR IC-27 (March 19, 1975). A labor agreement which has unlawfully discriminatory effects can become a liability of the labor union under the provisions of RCW 49.60.190. A public employer's liability for such an agreement arises out of both the

Law Against Discrimination (RCW 49.60.180) and the Equal Rights Amendment to the state Constitution (Const. Article 31). The latter demands a heightened sensitivity by public officials to issues of sexual equality.*

Public policy on this issue being clear, we conclude that seniority bidding "rights" are not sufficient to overcome the need for balancing the civil rights of potential female correctional officers and the need for the employer to protect the personal privacy of the residents of the institutions. To base employment decisions in this matter only on seniority rights would perpetuate the exclusion of women from employment in male adult correctional facilities. It is simply unfair and discriminatory to subject women to competition based on seniority in a system from which they have been historically excluded.

The Commission is guided in this matter by the court's ruling in *U.S. v. Libbey-Owens Ford Co.*, D.C. Ohio, 3 FEP Cases 373 (1971), a case involving the seniority rights of men who claimed to be adversely affected by a consent decree involving the hiring of women. There the court stated:

> "However, certain fundamentals must be understood. A system which discriminates against some individuals necessarily discriminates in favor of others. The only way that the discrimination against some can be eliminated is to eliminate also that which is in favor of the others. This does not mean that the tables are turned

*The Law Against Discrimination is enacted to fulfill constitutional provisions concerning civil rights, RCW 49.60.010.

> so that the former underdog is now top dog, and vice versa, but only that in the future there will be neither. Necessarily, however, the one who was formerly in a favored position will no longer be so favored and thus may well suffer some loss. The loss, however, is only of that privilege or benefit to which the loser was not justly entitled."

The court's reasoning is applicable in this case. Male correctional officers occupy a position of relative privilege (at least in terms of the ability to accrue seniority) because of a past exclusion of women. Accordingly, employment practices which are based on seniority must bend to the extent necessary to implement public policies of non-discrimination. The need to make adjustments in seniority will decrease in proportion to the level of equality of opportunity achieved between the sexes. In this respect, the Federation may best serve the interests of its members, male *and* female, by working for the introduction of women into as many areas of employment as possible.

This binding declaratory ruling is issued this 17th day of February, 1977.

/s/ WINIFRED M. DUNCAN
Chairperson

/s/ ROY FLORES
Commissioner

/s/ KENNETH WEBSTER
Commissioner

/s/ W. H. PAGE
Commissioner

/s/ LINDA HUME
Commissioner

Attest:
/s/ BILL W. HILLIARD
Executive Secretary

[redacted]

[redacted]

Supreme Court U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-422

E. C. DOTHARD, *et al.*,

Appellants,

vs.

BRENDA M. MIETH, *et al.*,

Appellees.

On Appeal From the United States District Court for the Middle District of Alabama

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IN THE

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E. C. DOTHARD, *et al.*,

Appellants,

vs.

BRENDA M. MIETH, *et al.*,

Appellees.

On Appeal From the United States District Court for the Middle District of Alabama

Motion for Leave to File Brief as Amicus Curiae

The State of California respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae.

Consent of the parties has not been sought since this motion is filed by the State of California through its duly elected and acting Attorney General.

The State of California has an interest in this case in that California has adopted throughout its prison system a policy of "normalization" because officials of the California penal systems believe that rehabilitation will be enhanced by the presence of professional staff of both sexes in the State's penal institutions.

California is concerned that the arguments of appellees do not sufficiently emphasize the interest of the state in maintaining the policy of having women in the prison system and in ensuring equal employment applications for its female citizens.

Dated: March 28, 1977.

EVELLE J. YOUNGER,
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Interest of Amicus Curiae

The Attorney General of the State of California files this brief on behalf of the State of California and particularly the California Department of Corrections, the California Youth Authority and the Fair Employment Practice Commission. California has a well established policy of encouraging opportunities for women in all law enforcement agencies in the State, not only as an equal opportunity obligation, but also as a rehabilitative measure in prison settings. Consequently, California considers it vital to the furtherance of that policy that the decision of the lower court herein be affirmed.

The Department of Corrections and the Youth Authority have adopted as one of their primary responsibilities a policy of "normalization" within their respective institutions. Officials of these departments believe that rehabilitation will be enhanced by providing an environment which includes trained and competent professional staff of both sexes because that environment more closely approximates society than does a unisexual institution. The integration of women into the staffs of previously all male facilities has been going on for more than ten years. Officials of California are concerned that a decision by this Court overturning the decision below might have the effect of destroying or seriously impairing the normalization policy in California's penal institutions.

Additionally, the Fair Employment Practice Commission of California, which is charged with the duty of enforcing California's Fair Employment Practice Act (California Labor Code §§ 1410 *et seq.*) is concerned that an adverse decision in this matter will drastically

curtail its continuing efforts to insure that women have equal employment opportunities in all law enforcement agencies throughout the state.

Questions Presented

1. Does Alabama's Prison Regulation 204, which serves to exclude women correctional officers from serving in contact positions in all-male penitentiary violate Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-2)?

2. Does Alabama's Prison Regulation 204 violate the Equal Protection Clause of the Fourteenth Amendment?

3. Do prisoners have a right of privacy which would justify excluding women correctional officers from serving in contact positions in all-male penitentiaries?

Statement of Facts

The facts are essentially set forth in the Jurisdictional Statement of appellants, as modified in the Motion to Dismiss or Affirm of the Appellees. The Lower Court decision has an extensive exposition of all the facts upon which it based its decision. *Mieth v. Dothard*, 418 F.Supp. 1169 (D.C. M.D. Alabama, Northern Division, 1976).

Although the case below dealt with the effects of various Alabama statutes and regulations on the hiring of women for both the classification of State Trooper and the classification of Correctional Counselors (Prison Guards), no appeal has been taken from the Lower Court decision concerning the class of State Trooper. Appellants have appealed from the decision as it affects hiring for the class of Correctional Counselors.

For purposes of this Amicus brief, the key facts, as indicated in the decision below are:

One of the various merit system positions in the Alabama Correction System is that of correctional counselor. The entry level position for correctional counselor is that of correctional counselor trainee. The job description of a correctional counselor I is as follows:

> Patrols prisons and prison yards; stands watch in halls, at gates, or in wall towers; makes regular reports to supervisors.
>
> Supervises and keeps order among prisoners assigned to work in prison kitchens, shops, mills, laundries, or on farms.
>
> Enforces regulations covering sanitation and personal care.
>
> Inspects all traffic into and out of prison proper.
>
> Maintains constant watch for and reports unusual conditions or disturbances; keeps firearms in readiness for use if necessary; takes required action in emergencies to prevent escapes or suppress disorder; assists in recapture of escaped prisoners.
>
> Explains to inmates rules, procedures and services available at correctional institutions; counsels individual inmates regarding personal problems, educational and vocational opportunities and work assignments.
>
> Evaluates inmate behavior and adjustment to a correctional environment; submits evaluation reports. Instructs inmates in personal hygiene, discipline and proper etiquette.
>
> Performs related work as required.

As the above job description indicates, correctional counselors are persons who are commonly referred to

as prison guards. Their duties primarily involve security rather than counseling.

To apply for this position, applicants must possess a valid Alabama driver's license, be a high school graduate or GED equivalent, be free from physical defects, be between the ages of 20½ years and 45 years at the time of appointment, and fall between the minimum height and weight requirements of 5′2″, 120 pounds and the maximum of 6′10″ and 300 pounds. There is no written examination for the position of correctional counselor trainee; the grade assigned each applicant is based on experience and education. Employment is competitive. When a position opens, the Board of Corrections makes a request to the State Personnel Office for three names from the register. If more than one position is being filled, one name is submitted for each additional position.

The selection process described above is qualified by one exception, Administrative Regulation Number 204, which allows for selective certification for appointment of either male or female employees from the State Personnel Department's registers. Institutional wardens and directors identify each institutional correctional counselor I position which they find requires selective classification. The following criteria are used to establish that selective certification is necessary:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patrolling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries has been implemented. Women correctional counselors are not, however, precluded from serving in contact positions in the all-male institutions other than the penitentiaries. Contact positions are those which require personal interaction with inmates. A dormitory patrol would be a contact position whereas a guard tower surveillance would not. (418 F.Supp. at 1175-1176.)

Summary of Argument

California is vitally concerned with the question of whether female correctional officers may be excluded from serving in contact positions in all-male penitentiaries. California's policy is not to exclude women from such positions.

California contends that any state rule or regulation that directly or indirectly excludes women from such positions clearly violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2) relating to equal employment opportunities and also constitutes a violation of the Equal Protection Clause of the Fourteenth

Amendment by creating a constitutionally invalid classification.

Of greatest concern to California would be an adoption by this Court of a rule that prisoners incarcerated pursuant to valid criminal judgments have some ill-defined right of privacy which precludes the presence of women in their living quarters. California contends there is no such right, and to recognize or create such a right would require the states to abandon many efforts at creating a truly rehabilitated environment in prison, and unwarrantedly exclude from consideration for employment in such positions a substantial portion of the potential workforce.

ARGUMENT

INTRODUCTION

Alabama has appealed the entire part of the decision of the court below relating to hiring of prison guards. This decision dealt with two aspects of the Alabama statutes and regulations: (1) whether the minimum height and weight requirements for the position were valid under Title VII and the Constitution, and (2) the effect of Regulation 204 which excludes women correctional officers from contact positions in all-male penitentiaries. California does not use height and weight requirements for prison guard classes. We thus do not discuss the first issue presented.

California is, however, vitally concerned with the issue of exclusion of women from contact positions in all-male penitentiaries. Appellants appear to base their justification of their regulation which bars women from an entire class of jobs in the State's penal system on two distinct assertions. The first is that women would not be able to perform adequately and safely within the setting of an all-male penitentiary. The second is that the presence of women in male institutions violates the inmates' right of privacy. California respectfully contends that neither of these assertions is correct.

I.

Exclusion of Women From All Positions as Correction Officers Within All Male Prisons Is a Violation of Title VII of the 1964 Civil Rights Act

The purpose of the prohibition on sex discrimination in employment contained in Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e)[1] is to eliminate all discriminatory employment practices and to guarantee equal job opportunities for both sexes. *Hutchinson v. Lake Oswego School District #7,* 519 F.2d 961 (9th Cir. 1975); *Diaz v. Pan American Airways,* 442 F.2d 385 (5th Cir. 1971); *Sprogis v. United Air Lines,* 444 F.2d 1194 (7th Cir. 1971).

The Act basically prohibits discrimination in the hiring or discharging of any individual on the basis, *inter alia,* of sex (42 U.S.C. §2000e-2(a)). The major exception to the prohibition is for employment "where . . . religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the necessary operation of that particular business or enterprise. . . ." (42 U.S.C. §2000e-2(e).)

The Bona Fide Occupational Qualification exception to the basic rule was designed to permit discrimination only in those situations where necessity requires the hiring of one sex exclusively and should be narrowly construed. 29 CFR 1604.2; *Weeks v. Southern Bell,* 408 F.2d 228, (5th Cir., 1969). Neither preferences of the employer, co-workers, clients or customers nor outmoded notions of what are proper roles for men and women constitute valid grounds for limiting hiring to one sex exclusively. In order to exclude women

[1]Title VII has been made applicable to State Governments by the 1972 Amendment. [Citation]

there must be some objective, demonstrable evidence that women cannot perform the duties associated with the job. *Weeks v. Southern Bell, supra.*

Alabama's prison regulation 204 is the very antithesis of a valid B.F.O.Q. The sole basis for the regulation appears to be the feeling on the part of prison administrators that women would not be able to perform adequately and safely. (418 F.Supp. at 1184.) This "feeling" on the part of prison administrators is countered by experience showing the successful integration of females at other penal institutions. As the decision of the Court below notes, highly experienced and well qualified experts on penal systems presented expert testimony indicating that the presence of women in the all male institutions contributes to the normalization of the prison environment and has an advantageous psychological effect upon the prisoners. (418 F.Supp. at 1184.)

For this court to elevate the subjective feelings of prison administrators to the status of law would be to destroy thirteen years of progress toward equal employment opportunities for women. The entire thrust of the cases dealing with women's rights to equal employment opportunities as embodied in Title VII, has been to discredit the traditional sex stereotyped basis for denying women equal access to employment opportunities. *Weeks, supra.* Nonetheless, the State of Alabama is asking this court to put its seal of approval on precisely those notions of decency and propriety which previous cases have held unjustly deprive women of economic opportunities.

Alabama has presented no objective or empirical data to support the contention of its prison officials,

that as embodied in Regulation 204 women could not perform adequately and safely in all-male penitentiaries. Indeed, as the court below noted, Alabama in fact does have women in contact positions in all-male institutions other than the four large penitentiaries. (418 F.Supp. at 1184.)

Amicus contends that appellants have not presented any support to establish that excluding women from all-male penitentiaries is a bona fide occupational qualification. We, therefore, submit that Regulation 204 violates Title VII of the 1964 Civil Rights Act and must be struck down.

II.
Regulation 204 Violates the Equal Protection Clause of the Fourteenth Amendment

The Court below held that Regulation 204, in addition to violating Title VII, also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (418 F.Supp. at 1185.) Alabama's Regulation 204 creates exclusionary job categories based on sex and is therefore subject to judicial scrutiny to determine if it is valid. ***Reed v. Reed,*** 404 U.S. 71 (1971); ***Kahn v. Shevin,*** 416 U.S. 351 (1974). Since judicial analysis of the validity of gender-based classification under the Fourteenth Amendment is in a state of flux, Amicus suggests it would be useful at this point to briefly outline the various approaches the court has taken and try to pinpoint the appropriate test for this particular classification.

A. Standard of Review for Gender-Based Classifications

Until recently, the Court reviewed gender-based classifications in relationship to the very permissive standard commonly known as "the rational basis test" and upheld such classifications "if any statement of facts reasonably [could be] conceived" in their justification. *McGowan v. Maryland,* 366 U.S. 420, 426 (1961). In 1912, the U.S. Supreme Court upheld a classification scheme pursuant to which men but not women had to obtain a license to do hand laundry in Montana. *Quong Wing v. Kirkendall,* 223 U.S. 59 (1912). The decision was based on the court's determination that:

> "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. Particular points at which that difference shall be emphasized by legislation are largely in the power of the state." 223 U.S. at 63.

In 1948, the Supreme Court upheld a statutory scheme which barred women from tending bar in Michigan. *Goesaert v. Cleary,* 335 U.S. 464 (1948). The Court held that:

> "Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the state from drawing a sharp line

> between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The constitution does not require legislatures to reflect sociological changes or shifting social standards. . . . 335 U.S. at 465-466.

It was not until 1971 that the Supreme Court of the United States concluded that classifications based on sex must be carefully reviewed and that mere rationality was not sufficient to justify such classifications. *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* was followed in 1973 by *Frontiero v. Richardson*, 411 U.S. 677 (1973) in which the court determined that "classifications based upon sex, like classifications based upon race . . . are inherently suspect and must therefore be subjected to such judicial scrutiny." (411 U.S. 688.) In subsequent cases the U.S. Supreme Court appears to have eased the standard enunciated in *Frontiero*, *supra*, and evolved a third test which might fairly be called a "modified strict scrutiny test." Under this test, "classifications by gender must serve important governmental objectives and must be substantially related to those objectives" *Craig v. Boren*, ... U.S. ....., 97 S.Ct. 451 at 457 (1976).

B. Regulation 204 Does Not Meet the Standard of Review for Gender Based Classifications and Violates the Equal Protection Clause

Thus under the latest rules set down by this Court, Alabama's Regulation 204 must be examined to determine whether it is substantially related to the achievement of some important governmental objective. Alabama's prison officials have asserted that overall security in the prison system will suffer if women are hired in counselor positions. Amicus concedes that it

would be difficult to conceive of a more important governmental interest than that of maintaining security in the prison system. The more difficult question is whether the exclusion of women from "contact" positions bears a substantial relationship to the accomplishment of that goal.

Appellants advanced several supposedly objective reasons for their conclusion, most of them gleaned from statements made by various prison officials. (Defendants Brief on the Merits in the District Court pp. 27-28.) The following incidents were cited, among others, as support for Defendant's position:

> Female officer at Mobile Work Release caught discussing with inmates what "turns the ladies on." Also the length or the diameter of a man's penis being important in sexual intercourse with a female.
>
> Female clerk at Birmingham Work Release Center became romantically involved with an inmate. The clerk had access to inmate records.
>
> Obscene gestures made by inmates in the shower stalls at the Frank Lee Youth Center in the presence of a female officer.
>
> Inmates at Mobile Work Release referring to female officer as "baby" and "honey" which could lead to jealousy among inmates.
>
> Female correctional counselor pinched on buttocks at the Frank Lee Youth Center.

Amicus asserts that even the most casual persual of this "objective" evidence indicates that it is nothing more than statements of the deponents' subjective feelings. We believe that the lower court quite properly

rejected the assertion that such subjective feelings constitute a showing that women as a whole cannot adequately and safely perform the job.

In *Reed v. Reed, supra* and *Craig v. Boren, supra* the Court has rejected, as insufficient, justifications for gender-based classifications which are much stronger than the justifications put forth in the instant case. In *Reed* the statutory scheme which gave preference to men in probate matters was rejected despite the Court's recognition that the scheme would in fact reduce the case load and promote efficiency of the state's probate courts. In *Craig*, the state asserted that its statutory scheme prohibiting boys from drinking beer until they reached age twenty-one while allowing girls to do so at age eighteen was necessary to promote highway safety. In support of this contention the state introduced statistical evidence which established that .18% of the girls and 2% of the boys in the 18-21 year old age group were arrested for drunk driving.

The Court recognized that this did tend to show a correlation between sex and the interest to be served but nevertheless found the relationship too tenuous to justify the classification. Certainly the subjective feelings of the gentlemen who run the Alabama prisons do not even reach the level of jusitification which the Court has previously rejected in *Reed* and *Craig*.

The totally subjective nature of the justifications put forth by appellants can best be illustrated by a quote from the deposition of Judson C. Locke, Commissioner for the Alabama Board of Corrections. In response to a question concerning the basis for his opinion that men could perform the duties of a correctional officer better than women, Mr. Locke said:

> "The innate intention between a male and female. The physical capabilities, the emotions that go into the psychic make-up of a female versus the psychic make-up of a male. The attitude of the rural type inmate we have versus that of a woman. The superior feeling that a man has, historically, over that of a female." (Appendix p. 153.)

It is submitted that Alabama has failed to meet even the modified scrutiny requirements this Court has set for reviewing gender based classifications under the Equal Protection Clause. The District Court correctly concluded that Regulation 204 does violate the Equal Protection Clause.

III.

Prisoners Have No Right to Privacy Which Precludes the Presence of Women in Their Living Quarters

This Court has recognized that a personal right to privacy is protected by the Constitution even though not enumerated therein. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). However, the Court has also recognized that the reality of incarceration necessitates the withdrawal of many privileges. *Price v. Johnston*, 334 U.S. 226 (1948); *Cruz v. Beto*, 415 U.S. 319 (1972). Even the most well protected of the enumerated civil rights guaranteed by the Constitution such as free speech are curtailed in the prison setting, *Pell v. Procunier*, 417 U.S. 817 (1974). Whatever limited right of privacy inmates do have, it is not sufficient to justify the total exclusion of women from employment opportunities in the prison. As suggested by the lower court, the problem can be dealt with by adopting compromise

but effective measures. The district court suggested selective work responsibilities among officers rather than selective job classifications. (418 F.Supp. at 1185.)

We respectfully suggest that other compromises are possible. For example waist or shoulder high partitions would protect prisoners from unwarranted surveillance by members of both sexes. Such a compromise might also serve to alleviate some of the conditions referred to by the Court below which were found to be shocking to the conscience of reasonably civilized people. *James v. Wallace,* 406 F.Supp. 318. If prisoners in fact do have a fundamental right to privacy in the showers and toilets, that right should protect them from invasions of that right by both sexes. Once again, we assert that individual notions of what constitutes propriety and decency should not be substituted for a careful analysis of what is demanded by law.

Furthermore, evidence introduced in the trial court shows that there is support among experts on the penal system for the assertion that the presence of women in all male penal institutions contributes to the normalization of the prison environment, and has a positive psychological effect upon the prisoners (418 F.Supp. at 1184). To counter this, appellants have put forth their unsubstantiated conclusion not only that women could not perform safely, but also that prison supervisors held an ill defined concern for the privacy of the inmates. This Court cannot permit prison officials to base correctional procedures or employment practices

on a Victorian notion of propriety. *Cf. Weeks v. Southern Bell,* 408 F.2d 228 (5th Cir. 1969). Prison officials should be free to experiment with new ways of dealing with security and rehabilitation in the prison setting. Our objective is not to berate Alabama penal institutions or those in charge of them. California claims no final answer to prison security or safety for inmates, nor have we discovered the ultimate system of rehabilitation. We are concerned, however, that an analysis of prison problems and the search for solutions, whether in Alabama or California, not become sidetracked by concern for prisoners' rights of privacy without first examining the nature of that right alleged and its consequences.

In most of its institutions (all but four all-male penitentiaries) Alabama has apparently successfully accommodated personal privacy and modesty rights for prisoners with the desirability and obligation of hiring women in contact positions by selective work responsibilities. It rather inconsistently urges here a rule that would allow the concept of privacy for inmates to prevail, with the consequences that would limit employment opportunities for women throughout the country.

Amicus suggests the result compelled by Alabama's position is neither required by law, nor desirable from any point of view. California urges that the District Court correctly concluded that ". . . this tension between the individual's right to employment without regard

to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications. . . ." (418 F.Supp. at 1185.)

Conclusion

For the foregoing reasons, California, as Amicus Curiae, urges the Court to affirm the decision of the Court below.

Respectfully submitted,

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